Affd

Mr Justice Miller dissented

Judge Davis

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~510.~~ ~~527~~ 72

WILLIAM H. KIMBALL AND GUSTAVUS D. S. TRASK, APPELLANTS,

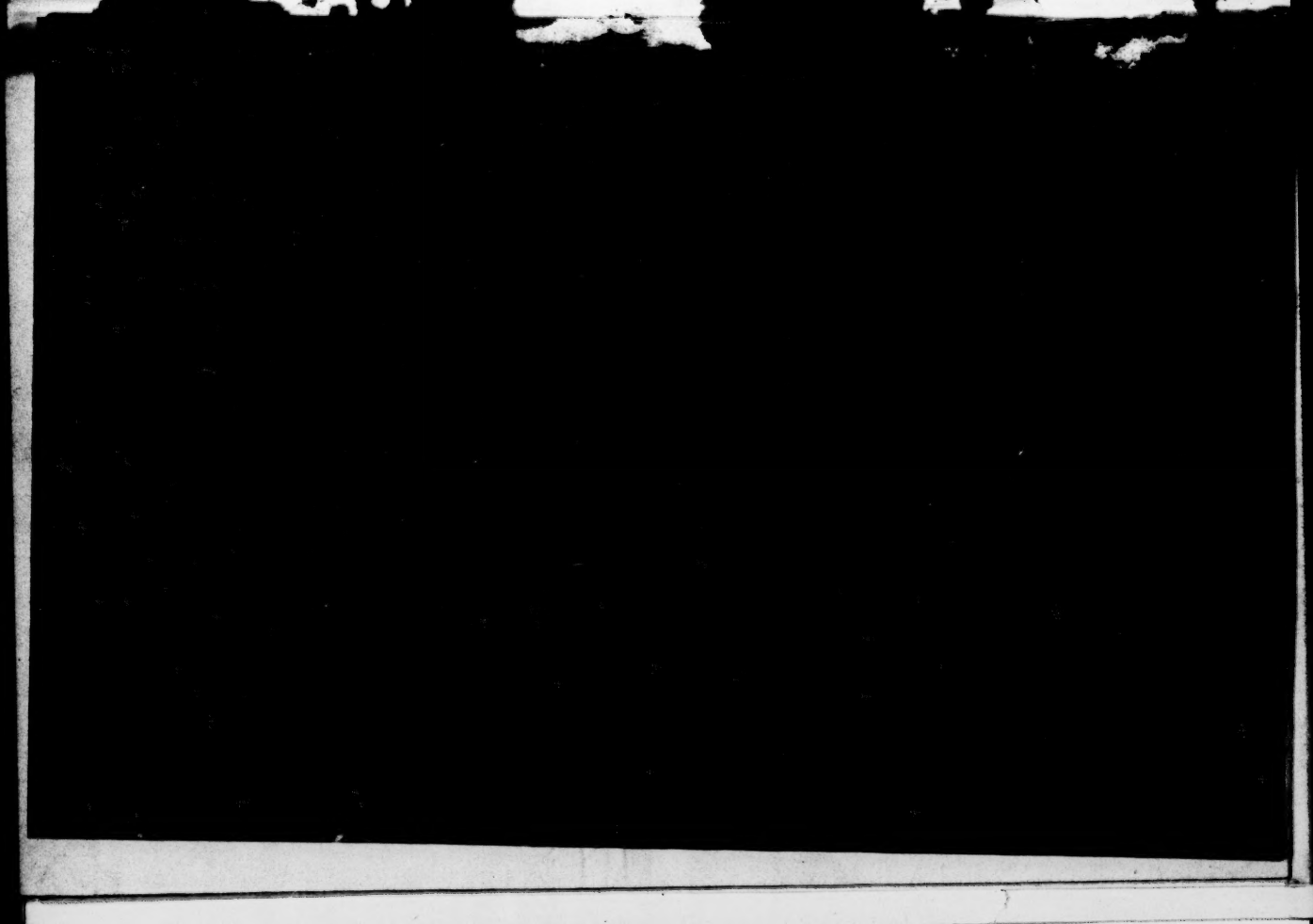
vs.

JAMES J. WEST.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED FEBRUARY 23, 1871.

Dec'd. 1872



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APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct.:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the October term thereof, A. D. 1870.

WILLIAM H. KIMBALL AND GUSTAVUS D. S. Trask, complainants, *ag'st.* JAMES J. WEST, defendant. } In chancery.

Be it remembered that heretofore, to wit, on the twenty-second day of June, A. D. 1868, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri the following bill in in equity, to wit:

Bill.

To the judges of the circuit court of the United States for the districts of Missouri.

The plaintiffs, William H. Kimball, who is a citizen of the State of Massachusetts, and resident of the city of Boston, and Gustavus D. S. Trask, who is a citizen of the State of New York, and resident of the city of Brooklyn, bring this their bill against James J. West, who is a citizen of the State of Missouri, and a resident of Clark County, and complain as follows:

That, on the 31st day of January, 1865, the defendant James J. West and his wife granted and conveyed, with general warranty,
2 to R. Palmer Elmore, in consideration of twenty-two thousand dollars, paid to him, said West, the following described tract of land, viz, beginning at an elm and mulberry on the east bank of the Little Kanawha River, at the mouth of Rock Run, in the county of Wood and State of West Virginia; thence up said river, with the meanders thereof, (521) five hundred and twenty-one poles to a buckeye, corner to land of James Nailor; thence N. (19°) nineteen degrees (120) one hundred and twenty poles to a maple on the bank of Straight Creek; thence up said creek, with the meanders thereof, (100) one hundred poles to a white-oak corner to Nailor at the mouth of Peggy's River; thence N. (150) fifteen degrees, west (65) sixty-five poles to a hickory; thence N. (61½°) sixty-one and a half degrees, west (157) one hundred and fifty-seven poles to a small wormwood; thence S. (30°) thirty degrees, west (257) two hundred and fifty-seven poles to the beginning; together with all and singular the appurtenances and hereditaments thereunto belonging, being the certain tract of land patented by the Commonwealth of Virginia to James J. West, on the 1st day of October, 1850, containing (400) four hundred acres, more or less, (11) eleven acres (3) three roods and (10) ten poles, conveyed to George F. Dihues by said James J. West, March 11, 1861: To have and to hold to the said R. Palmer Elmore and to his heirs and assigns forever; all which will more fully appear by reference to the deed of said West and wife, which is filed herewith, and marked exhibit of plaintiff's bill, No. 1.

And the plaintiff' state that by virtue of the statute law of West Virginia in force at the date of said conveyance, the words therein expressed, viz, "with general warranty," did and do mean that the
3 said West, by said conveyance, covenanted with the said R. Palmer Elmore to warrant generally the property hereby conveyed

to him, said Elmore, against all persons whomsoever, and to warrant and defend said property unto said Elmore, his heirs, personal representatives, and assigns, against the claims & demands of him, said West, and all persons claiming or to claim by, through, or under him.

That the consideration of twenty-two thousand dollars, mentioned in said deed, was fully paid by the plaintiffs to said West at or before the execution of said deed.

That said purchase was made by R. Palmer Elmore, acting as agent of the plaintiffs, from said West, for plaintiffs; that the said purchase-money was paid by the plaintiffs; that the said R. P. Elmore, agent as aforesaid, received said twenty two thousand dollars from plaintiffs under instructions from them to purchase said lands for them if a good title could be had; and he did purchase said lands for them, and the said R. Palmer Elmore took said conveyance from said West and wife to himself as grantee. The plaintiffs charge that he held said lands for the use of plaintiffs and in trust for them, and he, said R. Palmer Elmore, so admitted then and ever since to the plaintiffs, and on the 9th day of May, 1865, by request of the plaintiffs, conveyed said lands to them for the nominal consideration of ten thousand dollars, not in fact paid, the land really being the property of the plaintiffs. Said last mentioned deed is marked Ex'b't No. 2. The plaintiffs charge that the said West, in selling and conveying said lands aforesaid, was guilty of bad faith, and fraud, and practiced deceit and imposition upon the plaintiffs and their agent, said R. Palmer Elmore.

4 That in order to induce the said R. Palmer Elmore, the plaintiffs' agent, to purchase said lands as aforesaid, he, said West, represented to him, so acting for the plaintiffs, that his (West's) title to said tract of land was perfect; that there was no incumbrance on it, and no claim against it; whereas the plaintiffs state that said representations were untrue, as he, said West, well knew at the time of making them.

That the fact was and is that said title of said West to said land was not perfect; that, in fact, there was at the time of said sale and conveyance a claim against said lands, as the said James West well knew.

That on the 6th day of April, 1860, an action of ejectment was commenced by one William Lynch against said James J. West, who was at the time in possession of said land, for the recovery of a portion thereof under an adversary title. Said suit was commenced in the circuit court for the county of Wirt, in said State of West Virginia, and process was served on said West, who appeared and defended the same, and said suit was pending in said court until the 11th day of April, 1866, when it was tried and judgment rendered against said West therein; and by said judgment the said plaintiff William Lynch did recover in fee, from said West, a large portion of said tract of land so sold and conveyed with general warranty to said R. Palmer Elmore for the use and benefit of the said plaintiffs; that the portion of said tract of land so recovered by said Lynch from said West, amounted to (184) one hundred and eighty-four acres; and the part of said land so recovered by said Lynch, was the most valuable part of the tract so purchased by the plaintiffs, and in fact constituted the main inducement to the

5 purchase thereof; that neither said plaintiffs nor their agent would have purchased the said tract of land from said West had they not believed said West was the owner of the said 184 acres, together with the rest of the tract.

That the plaintiffs would not have purchased the residue of said tract without the 184 acres recovered by said Lynch. That the said West knowing that the said Lynch had commenced suit for said lands, fraud-

ulently concealed from plaintiffs and their agent the fact that said suit was pending and the fact of Lynch's claim; that had plaintiffs been informed of the existence of said suit of Lynch, they would not have purchased said lands from West; that after said West had received said purchase money and made his aforesaid deed, it was agreed by and between the said West and the plaintiffs' said agent that the said West should remain in possession of said tract of land and keep it for the plaintiffs until they should be ready to receive the possession thereof from him; that at no time did said West disclose the fact of the claims of said Lynch, or the prosecution of said suit, but fraudulently concealed the same, and so fraudulently concealed the rendition of the judgment of eviction had in said cause, and without notice to plaintiffs abandoned the possession thereof, and left the State of West Virginia and settled himself in Clark County, Missouri.

The plaintiffs state that they were not informed of the place to which the said West had changed his abode until late in the year 1867, and it was not until in the present year, 1868, that they discovered the frauds herein charged as practised by said West in the sale of said lands; that said West, by fraud and collusion with said Lynch, aban-
6 doned the occupation of said lands after agreeing to hold and deliver possession to plaintiffs' agent, and abandoned said suit without notice to the plaintiffs or their agent, and said Lynch took possession of said lands; that the said West, by fraud, misrepresentation, and concealment, procured the purchase aforesaid and the payment of the purchase-money, and the plaintiffs never were able to enter on the posssesion of said lands.

The plaintiffs state that they are owners of all the rights, titles, and interests, arising from said deed of West and wife to R. Palmer Elmore; that they paid all the purchase money, and the purchase by said Elmore and the deed made to him by West and wife was made for their benefit; and the plaintiffs say they are ready and willing to relinquish and reconvey to said West all said rights, titles, and interests in and to said lands arising under said deed of West & wife on repayment by him, West, of said purchase money and now offer to do so.

And forasmuch as the plaintiffs are without remedy by the strict rules of the common law, and may obtain relief only in equity where matters of fraud are cognizable, and full and perfect remedy may be granted, they pray that the process of this court may be issued against the said James J. West, the defendant; that he be required to answer the same on oath; that the said contract of sale may be rescinded and the plaintiffs allowed to reconvey, on said West refunding the purchase money; that the court will grant to them such other and further relief as may be right and proper; and the plaintiffs pray for general relief.

GLOVER & SHEPLEY,
Solicitors for Plaintiffs.

7 Whereupon to wit, in vacation of the said circuit court of the United States for the districts of Missouri, on the 22d June, 1868, the following proceedings in this cause were had to wit:

Bill in chancery filed and summons ordered.

WILLIAM H. KIMBALL AND GUSTAVUS D. S. Trask, complainants, *ag'st* JAMES J. WEST, DEFENDANT. } In chancery.

This day come the complainants, by their solicitor, and file their bill

in chancery against the defendant in this cause, and on motion of said solicitor, it is ordered that a subpœna in chancery be issued in said cause returnable to rules on the first Monday of August, 1868.

Upon which the following subpœna was issued, to wit:

Summons.

MISSOURI DISTRICT, *sct:*

The President of the United States to James J. West, greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the districts of Missouri, on the first Monday of August next, at the city of St. Louis, then and there to answer the bill of complaint of William H. Kimball, a citizen of the State of Massachusetts, and Gustavus D. S. Trask, a citizen of the State of New York, filed against you on the 22d day of June, 1868. Hereof fail not.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, the 24th day of June, 1868.

8 Issued at office in the city of St. Louis, under the seal of said court, the day and year last aforesaid.

[L. S.] BEN. F. HICKMAN, *Clerk.*

MEMO:—The defendant to enter his appearance in this suit in the clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

BEN. F. HICKMAN, *Clerk.*

Upon which summons the United States marshal for the eastern district of Missouri made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern district of Mo., ss:

I hereby appoint William Buskirk my special deputy to execute this writ.

St. Louis, Mo., July 18, 1868.

J. B. ROGERS,
U. S. Marshal, East Dist. Mo.

UNITED STATES OF AMERICA,
Eastern district of Missouri, ss:

Executed this summons by delivering a copy of the same, together with a copy of the bill in chancery in this case, to J. J. West, at Clark County, Mo., on the 22d day of July, 1868.

WILLIAM BUSKIRK,
Special Deputy.

STATE OF MO, *County of Clark.*

9 Personally appeared before me, William Buskirk, who, on his oath, says that he executed this summons in accordance with his return hereon endorsed.

Sworn to and subscribed this 22d day of July, 1868.

H. M. HOLLEY,
Clerk Clark Cir. Court.

And afterwards, in vacation of the circuit court of the United States for the districts of Missouri, on the eighth day of September, A. D. 1868, the following further proceedings were had, to wit:

Appearance entered.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day comes the defendant, James J. West, by his solicitors, and enters his appearance to the bill of complainants filed herein against him.

Which appearance, referred to in the foregoing order, and filed as aforesaid, is in the words and figures following, to wit:

Appearance.

United States circuit court, districts of Missouri.

KIMBALL & TRASK, COMPL'TS,
vs.
JAMES J. WEST, DEF'T.

The def't, James J. West, by Dryden and Lindley, his solicitors, comes and enters his appearance to the bill of complaint herein filed against him.

DRYDEN & LINDLEY,
For Def't.

10 And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis, in said districts, on the first Monday of October, A. D. 1868, the following further proceedings were had in said case on Tuesday, October 6th, 1868, to wit:

Answer filed.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day comes the defendant, by solicitor, and files his answer to the bill of complainants herein against him.

The answer referred to in the foregoing order, and filed as aforesaid, is in the words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the districts of Missouri.
In chancery.

The answer of James J. West, defendant, to the bill of complaint of William H. Kimball and Gustavus D. S. Trask, complainants:

11 This defendant, reserving to himself all right of exception to

the said bill of complaint, for answer thereto saith, that he admits that, for the consideration of twenty-two thousand dollars paid to him, he sold and conveyed to the said R. Palmer Elmore the tract of land in the complainant's bill described by means of the said instrument of writing attached to said bill marked Exhibit 1, except so much of said tract as is in said bill and in said instrument excepted; but the defendant denies that said conveyance was made on the 31st day of January, 1865, as alleged in said bill, but the defendant says that, although said conveyance bears date of the said 31st day of January, yet, in fact and in truth, the same was not delivered, nor was said purchase price paid, until long afterwards, to wit, on or about the 15th day of March, 1865.

And the defendant, further answering, says it may be true, for anything this defendant knows to the contrary, that, by virtue of the statute law of West Virginia in force at the date of said conveyance, the words therein expressed, "with general warranty," did and do mean that the defendant, by said conveyance, covenanted with the said R. Palmer Elmore to warrant generally the property thereby conveyed to said Elmore, and to warrant and defend said property unto said Elmore, his heirs, personal representatives and assigns, against the claims and demands of him, said defendant, and all persons claiming or to claim by, through, or under him, as in said complaint is alleged; but this defendant is an utter stranger to all and every of such matters, and cannot form any belief concerning the same.

12 And the defendant, further answering, says it is not true, and he therefore denies that the consideration of twenty-two thousand dollars mentioned in said deed, or any part of it, was paid to the defendant by the plaintiffs at the time alleged, or at any other time. On the contrary, the defendant says that said twenty-two thousand dollars was paid to the defendant, not by the plaintiffs, but by the said R. Palmer Elmore, the grantee in said deed; not at the date of said deed, but at the time of the delivery thereof.

And the defendant, further answering, admits that said purchase was made by R. Palmer Elmore, but the defendant further saith he knows not, and has not been informed, save by said complainant's said bill, and cannot set forth as to his belief or otherwise, whether said R. Palmer Elmore, in making said purchase, was acting as the agent of the plaintiff, nor whether said R. P. Elmore received said 22,000 dollars from the plaintiff, or from what source he received the same, nor if he did, in fact, receive the same from the plaintiffs, whether he received the same under the alleged instructions, or under any, and, if any, under what instructions from the plaintiffs; nor whether he, said Elmore, did purchase said lands for the plaintiffs; nor whether he held said lands for the use of the plaintiffs and in trust for them; nor whether he, the said R. Palmer Elmore, so admitted then, or at any other time, to the plaintiffs or to any other person or persons; but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same.

And the defendant, further answering, saith he believes it is true that the said R. Palmer Elmore, about the 9th of May, 1865, conveyed said lands to the plaintiffs; and, further answering, he says it may be true, for anything that this defendant knows to the contrary, that said conveyance from said R. P. Elmore to the plaintiffs was made by the

13 request of the plaintiffs, and for the nominal consideration of ten thousand dollars, but the defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same.

And the defendant, further answering, denies that he was guilty of

bad faith or fraud in selling and conveying said land, and denies that he practiced any deceit or imposition whatever upon the plaintiffs, or upon their said pretended agent, said R. Palmer Elmore; on the contrary, he alleges that his conduct towards the said R. Palmer Elmore in the sale and conveyance of said lands was open, frank, and fair, and free from all unfair dealing and deceit.

And the defendant, further answering, denies that he represented to the said R. Palmer Elmore, for the purpose alleged in said bill, or for any purpose, or at *at* all, that the defendant's title to said tract of land was perfect, or that there was no incumbrance on it, or that there was no claim against it, but the allegations of the bill with regard to the pretended representations are utterly false and without the shadow of truth.

The defendant admits that, at the time of the said sale and conveyance, one William Lynch claimed a part of said tract of land by a pretended title adverse to that of the defendant, and that on the 6th of April, 1860, the said Lynch commenced an action of ejectment in the circuit court of said county of Wirt, against the def't, to recover possession of the said part so claimed by him, and to which action the defendant appeared and defended; and that, at the time of the said sale and conveyance by this defendant, the said ejectment was still pending and undetermined in said court. And the defendant, further answering, saith that although he had no expectation the said Lynch would ever recover in said action, and although, furthermore, the defendant was not,
14 for a long time thereafter, aware of the recovery; yet he admits the fact to be that the said Lynch did, in said action, recover judgment for the possession of part of the tract so sold and conveyed by the defendant to said Elmore, but the defendant denies that the quantity so recovered was one hundred and eighty-four acres, as alleged by the plaintiffs, but he says the quantity recovered was 164 acres only.

And the defendant further denies that the part of said land so recovered by said Lynch was the most valuable part of the tract sold and conveyed by the defendant to Elmore, or that it constituted the main inducement to said purchase, and he further denies that the part of the tract so recovered by said Lynch is in anywise necessary to the enjoyment of the remainder of the tract, or that the value of the remainder of the tract is in any material respect impaired by reason of the recovery of Lynch. And the defendant, further answering, says the said recovery by the said Lynch was not the result of the superiority of the title under which he claimed, but was the result of a conspiracy entered into by and between the said Lynch and the plaintiff, and the said Elmore and others combining and confederating with them to cheat and defraud this defendant, and by means of which said conspiracy the said judgment was recovered, and by no other means.

The defendant, further answering, denies that he, fraudulently or otherwise, concealed from the plaintiffs, or from their said pretended agent, R. Palmer Elmore, the fact that said action of ejectment was pending or the fact of Lynch's claim; on the contrary, the defendant says that at and prior to the said sale to said Elmore, he, the said
15 Elmore, was distinctly informed, as well by the defendant as by others, of the said claim of said Lynch, and of the pendency of said action of ejectment; and that he, the said Elmore, accepted the said conveyance and paid the said purchase-price, well knowing that said Lynch claimed the said part of said tract, and that said action of ejectment was then pending.

The defendant, further answering, denies that after the defendant

had received the said purchase-money and made his said deed, or at any other time, it was agreed by and between the defendant and the plaintiffs' said pretended agent, that the defendant should remain in possession of said tract of land, and keep it for the plaintiffs, or for any other person, until they should be ready to receive the possession thereof from the defendant, or until any other period, or until the happening of any other event; on the contrary, it was well known to the said Elmore, at and before the payment of the said purchase-money, that it was the intention and purpose of the defendant, at his earliest convenience, after closing said transaction, to quit the possession of said tract and proceed with his family to this the State of Missouri, here to take up his abode; and, accordingly, within a period of less than ten days next after the payment of said purchase-money and the delivery of said deed to said Elmore, the defendant, with the full knowledge of the said Elmore, quit the possession of said tract of land, and proceeded with his family to this State, where he has ever since abode.

The defendant, further answering, says it is untrue that the defendant at no time disclosed the fact of the claim of said Lynch or the prosecution of said suit, or that he, fraudulently or otherwise, concealed
16 the same, or that he fraudulently or otherwise concealed the rendition of the judgment of eviction had in said cause.

And the defendant, further answering, saith it may be true, for anything this defendant knows to the contrary, that the plaintiffs were not informed of the place to which the defendant had changed his abode until late in the year 1867, as in said bill is alleged, but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same.

The defendant, further answering, denies that by fraud and collusion with said Lynch, or by any fraud or collusion whatever, the defendant abandoned the occupation of said lands, and also denies that he had agreed to hold and deliver possession to the said pretended agent of the plaintiffs; he also denies that he abandoned said suit without notice to the plaintiffs or their said pretended agent. And the defendant, further answering, saith he knows not and has not been informed, save by plaintiff's said bill, and cannot set forth as to his belief or otherwise, whether said Lynch took possession of the part of said tract so by him recovered, but this defendant is an utter stranger thereto, and cannot form any belief concerning the same.

The defendant, further answering, denies that the defendant procured the purchase and the payment of the purchase-money by fraud, misrepresentation, and concealment, as alleged, or that he was guilty of any fraud, misrepresentation, or concealment whatever in said sale and purchase. And the defendant, further answering, says that it is untrue that the plaintiffs never were able to enter on the possession of
17 said lands; but, on the contrary, the defendant says they were not only able to do so, but that the said R. Palmer Elmore, upon his purchase from the defendant, and the plaintiffs upon the said conveyance by Elmore to them, did enter upon the possession of said lands.

And the defendant, further answering, says he is informed and believes that it is untrue, and, upon his information and belief, denies that, at the time of exhibiting the plaintiff's bill of complaint herein, the plaintiffs were, or now are, the owners of all the rights, titles, and interest arising from said deed of this defendant and wife to said Elmore; and, in this connection, the defendant, further answering, says that

after the said conveyance by said Emore to the plaintiffs, to wit, on or about the twenty-second day of June, 1865, the plaintiff Trask sealed and delivered to the said R. Palmer Elmore, his certain deed of conveyance, whereby, for the consideration of one thousand dollars paid to him by said Elmore, he, said Trask, sold and reconveyed to the said Elmore, in fee, the undivided one-sixth part of the said tract so conveyed by the defendant to said Elmore, and the rights, interests, and estate thereby conveyed, are still out of the plaintiffs; and the defendant insists that the said Elmore is a necessary party to this suit, and without his presence as such, no decree can or ought to be made in this cause. The defendent files herewith a certified copy of the record of said last-named deed, marked Exhibit A, the original not being in his possession or power.

And the defendant, protesting that he was bound by no obligation, legal or moral, to assure the said tract of land to the said Elmore, or to the plaintiffs under him, as against the claim of said Lynch; yet, after learning that Lynch had recovered his said judgment in ejectment,
18 the defendant proceeded to the said State of West Virginia, and, on or about the first day of August, 1868, purchased from the said Lynch, for the consideration of one thousand dollars, and he, the said Lynch and wife, by their certain deed of that date, conveyed to the defendent, in fee, all their rights, interest, and estates in and to the part of the tract so recovered by said Lynch. Said last-named deed is not now in the custody of the defendent, but he will, if necessary, produce the same on the trial. He files herewith a copy of the record of the same, marked Exhibit B. And the defendant insists that, by means of said last-named conveyance, the title and ownership of said tract so conveyed by the defendant has become and is perfect in the said R. Palmer Elmore and those claiming title under him, and that the plaintiffs have suffered no harm or injury by reason of said claim and recovery of said Lynch.

But, if this honorable court should be of opinion that, in order to assure to said Elmore and those claiming under him, the title acquired by the defendant from Lynch, the defendant should execute another and further conveyance to said Elmore or those claiming under him, he hereby offers to do so, and to do any and every other act or thing necessary or proper to be done, to convey and assure the possession and ownership of said lands to the said R. Palmer Elmore, or to those deriving his rights. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this that there is any other matter, cause, or thing, in the said complainants' said bill of complain*ed* contained material or neces-
19 sary for this defendant to make answer unto and not herein, and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JAMES J. WEST, *Def't.*
Per DRYDEN & LINDLEY,
His Solicitors.

MISSOURI DISTRICTS, *set*:

James J. West, being sworn, upon his oath states that the matters contained in the foregoing answer, so far as stated from his own know-

ledge, are true, and so far as stated from information, he believes to be true.

JAMES J. WEST.

Subscribed & sworn to before me this 6th day of October, 1868.
BEN. F. HICKMAN,
U. S. Com. Mo. Dis.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Monday, October 26th 1868, to wit:

Replication to answer filed.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

20 This day come the complainants, by their solicitor, and file their replication to the answer of said defendant to the bill of complainants heretofore filed herein.

The replication referred to in the foregoing order, and filed as aforesaid, is in the words and figures following, to wit:

Replication.

W'M H. KIMBALL
vs.
JAMES J. WEST.

In cir. court U. States, dis. of Mo., Octo. T., 1868.

And now, at this day, comes the complainant, and for a replication to the answer of def't West, he says that the allegations of his bill in this cause are and each of them is true, and *and* that the allegations in the answer of the def't, wherein the allegations of the pl'ffs' bill are denied, or otherwise defended, are not true, and this he will prove.

GLOVER & SHEPLEY,
For Pl'ff.

And afterwards, at the April term of said circuit court, A. D. 1869, the following further proceedings were had in said case, on Thursday, May 13th, in said year, to wit:

Order that further time be allowed to take testimony.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties, by their solicitors, and by consent, it is ordered that further time, until the first day of next term of this
21 court, be allowed both parties to take testimony to be used on the hearing of this cause, and until which time the said cause is now continued.

And afterwards, at the October term of said circuit court, A. D. 1869, the following further proceedings were had in said case on Saturday, October 16th, in said year, to wit:

Motion filed to suppress the deposition of James J. West.

WILLIAM H. KIMBAL ET AL., COMPLAINANTS, *ag'st* JAMES J. WEST, DEFENDANT. } In chancery.

This day come the complainants, by solicitor, and file their motion to suppress the deposition of James J. West, as taken and filed in this cause, for the reasons as set forth in said motion.

The motion referred to in the foregoing order, and filed as aforesaid, is in the words and figures following, to wit:

Motion.

In cir. court of the U. States in ch'y, dist's of Mo., Octo. T., 1869.

KIMBALL & TRASK, PLAINTIFFS, *vs.* WEST. }

The plaintiffs in this cause move the court to suppress the deposition of James J. West, taken Sept. 29, 1869, for the following reasons:

1st. The deposition of said West had been taken in the cause, Ap'l 3, '69, and filed in the cause April 8, '69, and the deposition which the court is, by this motion, asked to suppress, was taken without any application to the court therefor, and without notice to the plaintiff.

22 2. When the deposition of a witness has been once taken, filed in the cause, and published, the same party has no right to reëxamine said witness, except for reasons shown to the court and an order to that effect, and no such order is ever granted except on condition the opposite party shall have notice to cross-examine.

GLOVER & SHEPLEY,
For Plaintiffs.

And afterwards, at said last mentioned term of said circuit court, the following further proceedings were had in this case on Saturday, November 6th, in said year to wit:

Motion to suppress deposition of West overruled, and further leave granted parties to take testimony.

WILLIAM H. KIMBAL ET AL., COMPLAINANTS, *ag'st* JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties, by solicitors, and the motion heretofore filed to suppress the deposition of James J. West being argued and submitted to the court, the same is hereby overruled; and to which overruling said complainants, by solicitor, excepts; and on motion of said solicitor it is ordered that said cause is continued at the costs of defendant, and time to take depositions allowed defendant until the 15th day of January next, in the counties of Wirt and Wood, in the State of

West Virginia, but no deposition of any witness heretofore examined is to be retaken, the complainant to have until the first day of April next to take testimony in rebuttal.

And afterwards, in vacation of said circuit court, A. D. 1869,
23 the following further proceedings were had in said case on Tuesday, December 21st, in said year, to wit:

Order concerning the taking of depositions.

WILLIAM H. KIMBAL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties, by their solicitors, and on their motion it is ordered that notice to take testimony by depositions in this cause, in the counties of Wood and Wirt, in West Virginia, be given at least fifteen days before the day named therefor.

And afterwards, at the April term of said circuit court, A. D. 1870, the following further proceedings were had in said case on Monday, May 9th, in said year, to wit:

Hearing of cause begun.

WILLIAM H. KIMBALL ET AL, COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties, by their respective solicitors, and by consent, it is ordered that this cause be now set down for hearing instanter, and thereupon said cause having been thus brought on for hearing, the same was heard in part, and the hearing thereof not being concluded at the hour of adjournment, it is ordered that the further hearing of said cause be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case on Tuesday,
24 May 10th, in said year, to wit:

Hearing of cause concluded and same taking under advisement.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come again the parties, by their respective solicitors, and the hearing of this cause was resumed and said cause further heard, and the hearing thereof being concluded, said cause is submitted to the court on the pleadings, and proofs, and arguments of counsel, and the court not being fully advised of and concerning the premises, doth take the same under advisement.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Thursday, May 19th, in said year, to wit:

Interlocutory decree.—Alexand' Martin appointed master pro hac vice.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come again the parties, by their respective solicitors, and this cause having been brought on for hearing at the present term of this court, and having been fully heard, argued, and submitted, and the court being fully advised of and concerning the premises, it is ordered, adjudged, and decreed that the defendant, James J. West, make to the complainants, William H. Kimball and Gustavus D. S. Trask, a good and sufficient deed, to be approved by Alexander Martin, esq., who is hereby appointed master pro hac vice, conveying and assuring to them, the said complainants, the title acquired by the defendant from
25 William Lynch, in and to the following described tract of land, viz:

That certain tract of land situated in the county of Wirt, formerly Wood County, State of West Virginia, on the east side of the Little Kanawha River, and bounded as follows, to wit: Beginning at an elm and mulberry on the bank of said river at the mouth of Rock Run; thence up said river with the meanders thereof (521) five hundred and twenty-one poles, to a buckeye, corner to land of James Nailor; thence N. 19° E. (120) one hundred and twenty poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof (100) one hundred poles, to a white oak, corner to Nailor, at the mouth of Peggys' Run; thence N. 15° W., (65) sixty-five poles, to a hickory; thence N. 61½° W., (157) one hundred and fifty-seven poles, to a small wormwood; thence S. 30° W., (257) two hundred and fifty-seven poles, to the beginning, together with all and singular, the appurtenances and hereditaments thereunto belonging, being the certain tract of land patented by the Commonwealth of Virginia to James J. West, on the 1st day of October, 1850, containing (400) four hundred acres, more or less, excepting therefrom (11) eleven acres, (3) three roods & (10) ten poles, conveyed to Geo. F. Dihms by the said James J. West, per deed March 11th, 1861.

And it is further ordered, adjudged, and decreed that the said master report to this court on or before the first day of the next term thereof whether such conveyance has been made; and it is further ordered and adjudged that the defendant pay the costs of this suit, and that execution be issued therefor.

And afterwards, at the October term of said circuit court, A. D. 1870, the following further proceedings were had in said case on Wed-
26 nesday, October 5th, in said year, to wit:

Master's report filed.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day comes Alexander Martin, the master heretofore appointed herein, and files his report in accordance with the interlocutory decree rendered in this cause at the last term of this court.

The master's report, referred to in the foregoing order, and filed as aforesaid, is as follows, to wit:

Report of master.

In circuit court of United States in and for the districts of Missouri.

WILLIAM H. KIMBALL, GUSTAVUS D. S. TRASK, plaintiffs,
vs.
JAMES J. WEST, DEFENDANT.

To the hon. circuit court of the United States:

The undersigned, to whom was referred the matter of the execution of the deed or conveyance mentioned in the order of the court against the defendant, whereby said West was adjudged and decreed and ordered to make to said Kimball and Trask a good and sufficient deed conveying to them all the right and title acquired by him in and to the said tract of land so as aforesaid conveyed to him by said Wil-
27 liam Lynch, has to report to your honorable court that said West and wife have made and executed and acknowledged in due form a deed complying with the order aforesaid, which deed vests the premises in said complainant's according to the said order or decree, which deed made, executed, and acknowledged as aforesaid, is herewith returned to your honorable court.

Witness my hand this 3rd day of October, 1870.

ALEXANDER MARTIN, *Referee.*

Fee, $20.

Which deed referred to in the foregoing report is in the words and figures following, to wit:

Deed of West and wife to Kimball & Trask, executed in compliance with interlocutory decree.

This deed, made and entered into this 27th day of June, A. D. 1870, by and between James J. West and Harriet West, his wife, of the county of Clark, in the State of Missouri, parties of the first part, and William H. Kimball and Gustavus D. S. Trask, parties of the second part, witnesseth: Whereas the said parties of the first part, by their certain deed, bearing date the 30th day of January, 1865, for the consideration therein named, sold, conveyed, and transferred to one R. Palmer Elmore, the grantor of the said Kimball and Trask, the tract of land hereinafter described; and whereas one William Lynch, in an action of ejectment pending against said James J. at the time of the making of said deed, afterwards recovered judgment in the circuit court of the county of Wirt, in the State of West Virginia, for part of said tract of land; and whereas the said Lynch, after his said recovery, by his certain deed, bearing date the 1st day of August, 1868, sold,
28 conveyed, and transferred the said part of said tract so by him recovered as aforesaid, to him the said James J. West; and whereas in a certain suit in equity pending in the United States circuit court for the districts of Missouri, wherein the said Kimball and Trask are complainants and the said James J. West defendant, the said last-named court, at its April term, 1870, ordered, adjudged, and decreed that the said James J. should make to them, the said Kimball and Trask, a good and sufficient deed, conveying to them all the right and title acquired by him in and to the said tract of land so as aforesaid conveyed to him by said William Lynch: Now, therefore, the said parties of the

first part, in consideration of the premises and of the sum of one dollar to them paid by said parties of the second part, the receipt of which is hereby acknowledged, and in compliance with the requirements of said decree, do, by these presents, grant, bargain, and sell, remise, release, relinquish, convey, and confirm unto the said William H. Kimball and Gustavus D. S. Trask, their heirs and assigns, the following-described tract or parcel of land lying and being in said county of Wirt, in said State of West Virginia, being the same tract so as aforesaid sold and conveyed to said R. Palmer Elmore, and embracing the part thereof so as aforesaid recovered by said Lynch, and conveyed by him to said James J., that is to say: Beginning at an elm and mulberry on the east bank of the Little Kanawha River at the mouth of Rock Run; thence up said river with the meanders thereof five hundred and twenty-one (521) poles, to a buckeye, corner to land of James Nailor; thence N. 19° E. one hundred and twenty poles, to a maple on the bank of
29 Straight Creek; thence up said creek with the meanders thereof one hundred (100) poles, to a white oak, corner to Nailor, at the mouth of Beggy's Run; thence N. 15° W. sixty-five (65) poles, to a hickory; thence N. 61¼° W. one hundred and fifty seven (157) poles, to a small wormwood; and thence S. 30° W. two hundred and fifty-seven (257) poles, to the beginning, excepting therefrom eleven acres three roods and ten poles thereof, heretofore and before the said conveyance to said R. Palmer Elmore, conveyed by the said James J. to one George F. Dihms: To have and to hold the said granted and meted and bounded tract or parcel of land, except the part thereof above excepted, together with the appurtenances, unto the said Kimball and Trask, and unto their heirs and assigns, forever; and the said James J. West hereby covenants and agrees to and with the said Kimball and Trask that he, his heirs, and personal representatives will forever warrant and defend the said property hereby conveyed unto them, the said Kimball and Trask, their heirs, personal representatives, and assigns, against the claims and demands of all persons whomsoever.

In testimony whereof the said James J. West and Harriet, his wife, have hereunto set their hands and seals this the day and year in that behalf first aforesaid.

JAMES J. WEST. [SEAL.]
HARRIET WEST. [SEAL.]

[25c. U. S. R. stamp.] [25c. U. S. R. stamp.]

STATE OF MISSOURI, *County of Clark, ss:*

I, Jno. S. Clark, a notary public, within and for the county of Clark, in the State of Missouri, do certify that James J. West, whose
30 name is signed to the above writing, bearing date the 27th day of June, 1870, has acknowledged the same before me, in my county aforesaid.

Given under my hand and official seal at said county, this 31st day of August, A. D. 1870.

JNO. S. CLARK, *N. P.* [L. S.]

STATE OF MISSOURI, *County of Clark, ss:*

I, Jno. S. Clark, a notary public, within and for the county of Clark, in the State of Missouri, do certify that Harriet West, the wife of James J. West, whose names are signed to the above writing, bearing date on the 27th day of June, A. D. 1870, personally appeared before me in my county aforesaid, and being examined by me privily and apart from her said husband, and having the writing aforesaid fully explained to her,

she, the said Harriet West, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand and official seal, in my said county, this 31st day of August, A. D. 1870.

[L. S.] JNO. S. CLARK, *N. P.*

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on Tuesday, November 1st, 1870, to wit:

Cause set for hearing on second November.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
vs.
JAMES J. WEST, DEFENDANT. } In chancery.

31 It is ordered that this cause be now set down for hearing for to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Wednesday, November 2nd, A. D. 1870, to wit:

Final decree.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties, by their respective solicitors, and the master's report herein not having been excepted to by the complainant, the same is by the court confirmed, and the deed accompanying the said report and therein referred to, is approved by the court, and thereupon the said defendant, by his solicitor, here in open court, tenders and offers to deliver the said deed to the complainants, but the same is refused by the complainants. And thereupon it is finally ordered, adjudged, and decreed by the court that the complainants' bill herein be dismissed, and that the def't pay the costs of the suit as heretofore decreed, including the sum of twenty dollars, which is hereby allowed as the master's fee herein.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Saturday, November 5th, in said year, to wit:

Appeal allowed to U. S. S. Court.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS,
ag'st
JAMES J. WEST, DEFENDANT. } In chancery.

32 This day come the complainants, by their solicitor, and pray an appeal to the Supreme Court of the United States from the final decree heretofore rendered in this cause; and thereupon it is ordered that said appeal be allowed.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Monday, November 7th, in said year, to wit:

Bond of appeal filed and approved.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS, *ag'st* JAMES J. WEST, DEFENDANT. } In chancery.

This day come the complainants, by their solicitor, and said complainants having been allowed an appeal to the Supreme Court of the United States, present to the court their bond of appeal, signed by Elbridge Goddard, as principal, and John R. Shepley, as surety; which bond is approved by the court and ordered to be made part of the record herein.

Which bond referred to in the foregoing order is in the words and figures following, to wit:

Bond of appeal.

In the circuit court of the United States for the districts of Missouri.

WILLIAM H. KIMBALL & GUSTAVUS D. S. TRASK *against* JAMES J. WEST.

Know all men by these presents that we, Elbridge Goddard, as principal, and John R. Shepley, as security, are held and firmly bound
33 unto James J. West in the sum of five hundred dolla[illegible] or the payment of which well & truly to be made, we bind ourselves & each of us, & each of our heirs, executors, & administrators, firmly by these presents, sealed with our seals, & dated this 7th day of November, 1870. The condition of this obligation is such, that whereas, the complainants in the above-entitled cause *has* prayed for and been allowed an appeal to the Supreme Court of the United States to reverse the decree rendered in said cause by the circuit court of the United States for the districts of Missouri, at the October term, 1870, of said circuit court:

Now, therefore, if the above-named William H. Kimball and Gustavus D. S. Trask, their heirs, executors, & administrators, shall well & truly prosecute said appeal to effect, and answer all damages & costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force & virtue.

ELBRIDGE GODDARD. [ ]
JOHN R. SHEPLEY. [SEAL.]

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said case on Saturday, November 12th, in said year, to wit:

Agreement filed, specifying papers to be embraced in transcript to U. S. S. Court.

WILLIAM H. KIMBALL ET AL., COMPLAINANTS, *ag'st* JAMES J. WEST, DEFENDANT. } In chancery.

This day come the parties herein, by their respective solicitors, and

file an agreement in writing specifying the papers and proceed-
34 ing used in the hearing of this cause, and agreeing that such papers and proceedings be included in the transcript to be certified to the Supreme Court of the United States under the appeal heretofore granted herein.

The agreement referred to in the foregoing order, and filed as aforesaid, is in the words and figures following, to wit:

Agreement.

In the circuit court of the United States for the districts of Missouri.

WILLIAM H. KIMBALL & GUSTAVUS D. S. TRASK
against
JAMES J. WEST.

It is ordered by the court that a transcript of the bill, answer, replication, & other pleadings, and the evidence given on the part of the parties, complainants and defendant, upon the hearing of the cause, as also the report of the master, together with the deed of said defendant to said complainants, returned by said master with his report, & all orders made by said court in said cause, including—

First, on the part of complainant, the following evidence:

1st. Deed of James J. West & wife to R. Palmer Elmore, dated 31st January, 1865.
2nd. R. Palmer Elmore to complainants, dated May 9, 1865.
3rd. Gustavus D. S. Trask to R. P. Elmore, dated June 22, 1865.
4th. R. Palmer Elmore to Latimer Bailey, dated Dec. 14, 1865. Also, agreement between counsel, dated Nov. 4th, 1869, touching execution & delivery of said last-named deed.
5th. Latimer Bailey to William H. Kimball, dated 11 April, 1868.
35 6th. Title bond of West to R. P. Elmore, dated January 27th, 1865.
7th. R. Palmer Elmore's deposition.
8th. Deposition of C. B. Fisher.
9th. Deposition of M. L. Lockhardt.
10th. Deposition of William H. Kimball.
11th. Deposition of Lyman Elmore.
12th. Deposition of William Lynch, taken on part of compl'ts.
13th. Deposition of James M. Jackson.
14th. Deposition of J. B. Jackson.
15th. Deposition of William Lynch, taken on part of defendant.
16th. Laws of Virginia. (Code, chap. 117.)

Second, on the part of defendant, the following evidence:

1st. Deed of William Lynch to James J. West, dated
2nd. Deposition of Mary Cline.
3rd. Deposition of George W. Cline.
4th. Deposition of George E. Ball.
5th. Deposition of George Monroe.
6th. Deposition of James J. West, (taken on notice in West Virginia, in April, 1869.)
7th. Deposition of L. Haverty.
8th. Deposition Z. M. Knight.

9th. Deposition of Isaiah Lowman.
10th. Deposition of Harrison Cain.

GLOVER & SHEPLEY,
For Complainants.
DRYDEN & LINDLEY,
For Def't.

36 COMPLAINANT'S EVIDENCE.

Deed of West & wife to R. Palmer Elmore, executed Jan. 1st, 1865.

This deed, made the thirty-first day of January, in the year one thousand eight hundred and sixty-five, between James J. West and Harriet, his wife, of Wirt County, State of West Virginia, parties of the first part, and R. Palmer Elmore, of the city of New York, and State of New York, of the second part, witnesseth:

That, in consideration of the sum of (22,000) twenty-two thousand dollars, in hand paid, the receipt whereof is hereby acknowledged, the parties of the first part do grant, with general warranty, unto the party of the second part, that certain tract of land situate in the county of Wirt, formerly Wood County, State of West Virginia, on the east side of the Little Kanawha River, and bounded as follows, to wit: Beginning at an elm & mulberry on the bank of said river at the mouth of Rock Run; thence up said river with the meanders thereof (521) five hundred and twenty-one poles, to a buckeye, corner to land of James Nailor; thence W. 19° E. (120) one hundred & twenty poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof (100) one hundred poles, to a white oak, corner to Nailor, at the mouth of Peggy's Run; thence N. 15° W. (65) sixty-five poles, to a hickory; thence N. 61¼ W. (157) one hundred & fifty-seven poles to a small wormwood; thence S. 30° W. (257) two hundred & fifty-seven poles, to the beginning, together with all and singular the appertenances and hereditaments thereunto belonging, being the certain tract of land patented by the Commonwealth of Virginia to James J. West on the 1st day of October, 1850, containing (400) four hundred acres, more
37 or less, less (11) eleven acres (3) three roods & (10) ten poles conveyed to Geo. F. Dihms by the said James J. West, p'r deed March 11th, 1861.

To have and to hold to the said party of the second part and to his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set *there* hands and seals the day and year first above written.

JA'S J. WEST. [L. S.]
HARRIET WEST. [L. S.]

[2-dollar U. S. R. stamp.] [20-dollar U. S. R. stamp.]

Witness by
F. F. STEDMAN.

TOWNSHIP OF BURNING SPRINGS,
Wirt County, to wit:

I, Lemuel Haverty, J. P., in the State of West Virginia, do certify that James J. West, whose name is signed to the writing hereto annexed, bearing date on the 31st day of January, in the year one thousand eight hundred and sixty-five, acknowledged the same before me

in my township aforesaid, to be his act & deed for the uses & purposes therein mentioned. Given under my hand this thirty-first day of January, in the year one thousand eight hundred and sixty-five.

LEMUEL HAVERTY,
Justice of Burning Spring Township.

STATE OF WEST VIRGINIA,
Township of Burning Springs, Wirt County, to wit:

I, Lemuel Haverty, justice of the peace in said township, do certify that Harriet West, the wife of James J. West, whose names are signed to the writing hereto annexed, bearing date on the thirty-first day of January, in the year one thousand eight hundred and sixty-five, personally appeared before me in my township aforesaid, and being duly
38 examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Harriet West, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand the thirty-first day of January, in the year one thousand eight hundred and sixty-five.

LEMUEL HAVERTY,
Justice of Burning Spring Township.

STATE OF WEST VIRGINIA,
County of Wirt, ss:

I, M. L. Lockhart, clerk of the circuit court of Wirt County, hereby certify that Lemuel Haverty, esq., before whom the foregoing acknowledgement was taken, is and was at the time of taking the said acknowledgment an acting justice of Burning Spring Township, Wirt County, West Virginia, duly qualified according to law to take acknowledgments of deeds, &c.

Given under my hand and official seal this 31st day of January, 1865.

[L. S.] M. L. LOCKHART, *Clk C. C.*

[Stamp.]

WIRT COUNTY RECORDER'S OFFICE,
March 27, 1865.

The foregoing deed, together with certificate of acknowledgment thereto annexed, was received in my office duly stamped & cancelled and recorded in deed book No. 6, page 60.

Teste:

C. B. FISHER, *Recorder, W. C.*

39 *Deed of R. P. Elmore to Wm H. Kimball & G. D. S. Trusk, executed May 9th, 1865.*

This deed, made this ninth day of May, A. D. 1865, between R. P. Elmore, of the city of New York, of the county of New York, and State of New York, of the first part, and William H. Kimball, of the city of *Brooklyne*, in the State of Massachusetts, and G. D. S. Trask, of the city of Brooklyn, of the county of Kings, and State of New York, of the second part, witnesseth:

That for and in consideration of the sum of ten thousand dollars, to him in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part do grant unto the said parties of the second part, the following tract or parcel of land, situate, lying, and being in the

county of Wirt, and State of West Virginia, to wit, lying, on the little Kanawha River, three miles above Burning Springs, being the farm lately owned by J. J. West, described as follows: Commencing at an elm and mulberry at the mouth of Rock River; thence up the river with the meanders thereof, 521 poles, to a buckeye; thence N. 19 E. 128 *miles*, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run*n*; thence N. 15 W. 67 poles 40-100, to a hickory; thence N. 67½ west 157 poles, to a small wormwood; thence south 36 W. 256 poles, to the beginning, containing 459 acres, be the same more or less. And the parties of the first part covenant that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals—

LYMAN ELMORE, W. I. BUTLER.

R. P. ELMORE. [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

[Five-dollar U. S. R. stamp.] [Five-dollar U. S. R. stamp.]

40 WEST VIRGINIA,
Wood County, to wit:

I, Henry Amess, a notary public in and for the county aforesaid, in the State of West Virginia, do certify that R. P. Elmore, whose name is signed to the foregoing writing, bearing date on the ninth day of May, 1865, has acknowledged the same before me, in my county aforesaid. Given under my hand this 9 day of May, 1865.

HENRY AMESS, *Notary Public.*

WEST VIRGINIA:

WIRT COUNTY RECORDER'S OFFICE,
July 1*st*, 1865.

The within deed duly stamped and acknowledged was received in said office this day, and recorded in deed book, No. 6, page 422.

Teste:

C. B. FISHER, *Recorder.*

[One-doll. stamp.]

Deed of G. D. S. Trask to R. P. Elmore, executed June 22*d*, 1865.

This indenture, made the twenty-second day of June, in the year eighteen hundred and sixty-five, between Gustavus D. S. Trask, of the city of Brooklyn, county of Kings, and State of New York, party of the first part, and R. P. Elmore, of the city of New York, party of the second part, witnesseth:

That the said party of the first part for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to me in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim
41 unto the said party of the second part, and to his heirs and assigns fo'ever, all the undivided one-sixth part of the following tract or parcel of land situate, lying, and being in the county of Wirt,

and State of West Virginia, to wit: Lying on the Little Kanawha River, three miles above Burning Springs, being the farm lately owned by J. J. West, bounded as follows: Commencing at an elm and mulberry at the mouth of Rock *River*; thence up the river with the meanders thereof, five hundred and twenty-one (521) poles, to a buckeye, thence N. 19° E 128 poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run; thence N. 15 W. 67 poles 40-100, to a hickory; thence N. 67½ west 157 poles, to a small dogwood; thence N. 36 W. 256 poles, to the beginning, containing 459 acres, more or less; being the same property conveyed to the party of the first part, and W'm H. Kimball, by deed bearing date the 9th day of May, 1865, by one R. P. Elmore, and this deed being intended to convey but one-sixth of the said property as the same remains of record in the name of the party of the first part, the said party of the first part, still retaining one undivided one-third part or interest in said tract, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the said party of the first part, of, in, or to the above described premises and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular, the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part and assigns forever.

In witness whereof the said party of the first part has hereunto
42 set his hand and seal the day and year first above written.

G. D. S. TRASK. [SEAL.]

Sealed and delivered in the presence of—
JAMES G. WHITE.

CITY & COUNTY OF NEW YORK, *ss:*

On this twenty-second day of June, one thousand eight hundred and sixty-five, before me, personally came Gustavus D. S. Trask, to me known, and known to be the individual described in and who executed the within instrument, and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

JAMES J. WHITE,
Notary Public, N. Y. City.

STATE OF NEW YORK,
City and County of New York, ss:

I, William C. Connor, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that James J. White, whose name is inscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and further, that I am well acquainted with the han'writing of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed
43 the seal of said court and county the 23rd day of December, 1865.
[SEAL.] W'M C. CONNOR, *Clerk.*

[15-cent stamp.]

RECORDER'S OFFICE OF WIRT COUNTY, WEST VIRGINIA,
January 4th, 1866.

The foregoing deed was this day received in said office, stamped with an U. S. I. R. S. of the denomination of one dollar, and admitted to record therein.

Teste: C. B. FISHER, *Recorder.*

WEST VIRGINIA, WIRT COUNTY, RECORDER'S OFFICE,
January 9th, 1869.

I, Charles B. Fisher, recorder of Wirt County, in said State, hereby certify that the foregoing is a true copy of the record of the above deed.

Given under my hand and official seal, at Elizabeth, the day and year last aforesaid.

[SEAL.] C. B. FISHER, *Recorder.*

[5-cent U. S. R. stamp.]

Fees & tax on seal, $2 25.

Deed of R. P. Elmore to H. Bailey, executed December 14th, 1865.

[One dollar U. S. R. stamp.]

This indenture, made the fourteenth day of December, in the year one thousand eight hundred and sixty-five, between R. P. Elmore, of the city of New York, party of the first part, and Latimer Bailey, of said city, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to me in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim unto the said
44 party of the second part, and to his heirs and assigns forever, all the undivided one-sixth part of the following tract or parcel of land, situate, lying, & being in the county of Wirt, and State of West Virginia, to wit: lying on the Little Kanawha River three miles above Burning Springs, being the farm lately owned by J. J. West, described as follows: Commencing at an elm & mulberry at the mouth of Rock River; thence up the river with the meanders thereof five hundred and twenty-one (521) poles, to a buckeye; thence N. 19° E. 128 poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run; thence N. 15° W. 67 poles $\frac{40}{100}$, to a hickory; thence N. 67½° west 157 poles, to a small wormwood; thence sough 36° W. 256 poles, to the beginning, containing 459 acres, more or less, being the premises described in a deed by G. D. S. Trask, of Brooklyn, King's County, to R. P. Elmore, dated 22d day of June, 1865; together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, re-

mainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part and assigns forever.

In witness whereof the said party of the first part has hereunto
45 set his hand and seal the day and year first above written.

R. P. ELMORE. [SEAL.]

Sealed and delivered in the presence of—
W. J. BUTLER.

STATE OF NEW YORK,
City & County of New York, ss:

On this fourteenth day of December, in the year one thousand eight hundred and sixty-five, before me, personally came R. P. Elmore, known to me to be the individual described, and who executed the foregoing instrument, and acknowledged that he executed the same.

JAMES K. AYMAR,
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

I, William C. Conner, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that James K. Aymar, whose name is inscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate or proof or a'knowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

46 In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 23rd day of December, 1865.

[SEAL.]

W. C. CONNOR,
Clerk.

[5-cent U. S. R. stamp.]

RECORDER'S OFFICE OF
WIRT COUNTY, WEST VIRGINIA,
January 4th, 1866.

The foregoing deed was this day received in said office, stamped with a U. S. I. R. S. of the denomination of one dollar, and admitted to record therein.

Teste:

C. B. FISHER,
Recorder.

In cir. court U. States, in ch'y, districts of Mo.

WILLIAM H. KIMBALL & OTHERS
vs.
JAMES J. WEST.

The parties to this cause admit the execution and delivery of the deed from R. P. Elmore to Latimer Bailey, dated Dec'b'r 14, '65, in the possession of S. T. Glover; also, the execution of the deed recited therein and delivery thereof; also, the execution and delivery of the deed of Latimer Bailey to William H. Kimball, dated April 11, 1868, and now in said Glover's possession, *of said Glover*, said deeds conveying part of the tract of land mentioned in the pl'ffs' bill in the above cause; & this agreement is made to the intent that said deeds may used in evidence in said cause, if competent, but the defendant does not admit but denies that he had any knowledge or information of the existence of either of the said two deeds so in the possession of Mr. Glover, at any time prior to the day of the date of this stipulation.

47 St. Louis, Nov. 4th, 1869.

GLOVER & SHEPLEY,
For Pl'ffs.
DRYDEN & LINDLEY,
Solicitors for Def't.

Deed of L. Bailey to W'm H. Kimball, executed April 11th, 1868.

This indenture, made the eleventh day of April, in the year one thousand eight hundred and sixty-eight, between Latimer Bailey, of the city of New York, party of the first part, and William H. Kimball, of the city of Boston and State of Massachusetts, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quit-claimed, and by these presents does remise, release, and quit-claim unto the said party of the second part and to his heirs and assigns forever, all the undivided one-sixth part of the following tract or parcel of land situate, lying, and being in the county of Wirt and State of West Virginia, to wit: Lying on the Little Kanawha River, three miles above Burning Springs, being the farm lately owned by J. J. West, described as follows: Commencing at an elm & mulberry at the mouth of Rock River; thence up the river with the meanders thereof five hundred and twenty-one (521) poles, to a buckeye; thence N. 19° E. 128 poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run; thence N. 15° W. 67 poles $\frac{40}{100}$, to a hickory; thence N. 67½° west 157 poles, to a small wormwood; thence south 36° W. 256 poles, to
48 the beginning, containing 459 acres, more or less; being the premises described in a deed by R. P. Elmore to the said Latimer Bailey, by deed dated Sept. 14th, 1855, and recorded in deed book No. 7, page 298, of recorder's office of Wirt County aforesaid, and being the undivided one-sixth interest conveyed to the said Bailey by the said deed, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and

the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

LATIMER BAILEY. [L. S.]

Sealed and delivered in the presence of—
WARREN G. BROWN.
GEO. A. PEASE.

[One-dollar U. S. R. stamp.]

STATE OF NEW YORK,
City and County of New York, ss., to wit:

I, Charles Nettleton, a commissioner appointed by the governor
49 of the State of West Virginia for the State of New York, do certify that Latimer Bailey, whose name is signed to the writing within, dated on the eleventh day of April, A. D. one thousand eight hundred and sixty-eight, has acknowledged the same before me, in my State aforesaid.

Given under my hand and official seal, at the city of New York, this 11th day of April, A. D. 1868.

[L. S.] CHARLES NETTLETON,
Commissioner for West Virginia in New York.

Title bond of West & wife to R. P. Elnore, executed Jan. 27th, 1865.

[2 cents U. S. R. S.] [2 cents U. S. R. S.] [2 cents U. S. R. S.]

Whereas, James J. West and Harriet West, his wife, of the county of Wirt, and State of West Virginia, of the first part, have this day bargained and sold, and by these presents do*th* bargain and sell, unto R. P. Elmore, of New York City, of the second part, *their* heirs, or assigns, all that certain tract, or parcel of land situate in Wirt County, and State of West Virginia, and bounded and described as follows, to wit: Beginning at an elm & mulberry on the east bank of the Little Kanawha at the mouth of Rock Run; thence up said river with the meanders thereof 521 poles, to a buckeye; thence N. 19° E. 120 poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run; thence N. 15° W. 65 poles, to a hickory; thence north 61½° west 257 poles, to a small iron-wood; thence south 30° west 157 poles, to the beginning, lying & being on the east side of Little Kanawha, four miles from the Burning Spring, containing 400 acres, more or less; for the sum of twenty-two thousand dollars, to be paid as follows, to wit, one
50 dollar in hand and twenty-one thousand, nine hundred & ninety-nine dollars within forty days from the date hereof. And in case R. P. Elmore, of the second part, shall elect to comply with said contract, within the time above-specified, by the payment of said sum of $21,999 00 *dollars* in forty days from date, at the Spencer House, in the city of Parkersburg, we promise to convey said real estate to *them* or

their heirs or assigns by good and sufficient deed of warranty, and not otherwise. Witness our hands and seals this 27th day of January, A. D. 1865.

JA'S J. WEST. [SEAL.]
HARRIET WEST. [SEAL.]

Signed and sealed in presence of—

In the U. S. cir. court for dist's of Missouri.

KIMBALL & TRASK, COMPL'TS,
vs.
JAMES J. WEST, DEF'T.

The compl'ts have in their custody a document, bearing date 27th Jan'y, 1865, purporting to be a title bond for the conveyance, by the def't, of the land in controversy in this case to R. P. Elmore, for the consideration of 22,000 dollars, one dollar of which, it is recited, was paid and the remaining 21,999 dollars payable within 40 days, being the same paper hereto annexed. The execution of said paper by the def't is admitted for the purposes of the trial of the above cause, and the paper may be used without further proof by either party.

St. Louis, Nov. 5th, 1869.

DRYDEN & LINDLEY,
For Def't.
GLOVER & SHEPLEY,
For Pl'ff.

51 *Deposition of R. Palmer Elmore.*

Deposition of R. Palmer Elmore, taken before Henry P. Ellis, a justice within and for the county of Milwaukee, and State of Wisconsin, at Milwaukee, in said county & State, on the 20th day of Jan'y, A. D. 1869.

R. PALMER ELMORE, a witness produced by said complainants, before me, H. P. Ellis, a justice of the peace in & for the county of Milwaukee, State of Wisconsin, residing in said county and duly qualified and sworn, and he, the said R. Palmer Elmore, being first carefully examined, and cautioned, & sworn, by me, to testify to the whole truth of his knowedge touching the matters in issue in said cause, doth depose & say:

I reside in Milwaukee, State of Wisconsin; am thirty-two years old. I know the complainants and defendants in this cause. In 1865, James J. West, by his deed of warranty, of date January 31st, of that year, conveyed to me in consideration of ($22, 000) twenty-two thousand dollars, a certain tract of land situated in Wirt County, West Virginia, the same being that upon which this cause arises; for a full description of said tract, I would refer to the deed of said West to me, of beforementioned date. In the purchase of this land I was acting as the agent of said Kimball & Trask; they furnished the purchase money, $22,000. I, on the 9th day of May, 1865, for the nominal consideration of ($10,000) ten thousand dollars, conveyed said lands to said Kimball & Trask. I did this in order to fulfil' my agency. No money was ever paid me or any one else for me. The consideration was merely nominal. I was au-
52 thorized by them, said Kimball and Trask, to purchase for them the said tract if a good title could be had from West. Just be-

fore the time of said purchase I saw one R. E. Phelps, West's lawyer, about the purchase, and he told me he had examined the records and that the title was all right in West, and at the time of said purchase West came to me with a deed of said land and an abstract of title to the said land; said abstract was signed by said Phelps and certified to be in accordance with the records by C. B. Fisher, recorder of Wirt County, West Virginia. This abstract states that "there are no judgment liens, lis pendens, trust-deeds, or taxes delinquent on said land;" and further states that "the record is entirely clear, from my own examination." Said abstract was dated January 30th, 1865, the day before the deed from West to me, and is hereunto attached, marked "Schedule A." In the purchase of the land I relied entirely upon the abstract, backed by the assurance of both West and Phelps that it was correct and in accordance with the facts and that there were no encumbrances of any description on the land. Neither West nor Phelps informed me of the suit of one Lynch in relation to the land, and I had no knowledge of it till long after judgment obtained—I think in 1867. On the other hand they assured me that there was nothing against the land in any shape, and that the title was all right and perfect. My attorney, J. B. Jackson, of Parkersburg, West Virginia, also advised me that, according to said abstract, the title was perfect, and West told
53 Jackson in my presence. I should not have taken the deed and paid the money, twenty two thousand dollars, had I not believed West's representations as to his having a perfect title. From the beginning to the end I was acting as the agent of the complainants in the purchase of this land, and though I took the deed in my own name this was only for the convenience of the real parties, Kimball & Trask, who live in Boston & New York, and I held the land for them as agent. I never took possession of the land. I have produced the abstract referred to by which I purchased the land in question; it is in the handwriting of R. E. Phelps and was delivered to me by James J. West and vouched for as true and correct by him & Phelps, his lawyer. I think I have stated this before.

R. PALMER ELMORE.

"SCHEDULE A."

Abstract title of James J. West.

Abstract title of James J. West, in Wirt County, (400) acres of land situate in Wirt, formerly Wood County, on the east side of the Little Kanawha River, and bounded as follows:

Beginning at an elm & mulberry on the bank of said river at the mouth of Rock Run; thence up the river with the meanders thereof 521 poles, to a buckeye, corner of lands of James Naylor; thence W. 19° E. 120 poles, to a maple on the bank of Straight Creek; thence up said creek with the meanders thereof 100 poles, to a white oak at the mouth of Peggy's Run; thence N. 15° W. 65 poles, to a hickory; thence W. 61½° W. 157 poles, to a small wormwood; thence S. 30° W. 257 poles,
54 to the beginning. Patented by the Commonwealth of Virginia to James J. West, Oct. 1st, 1850, and annually assessed to said party since the date of patent.

There is sold from the above described tract to Geo. F. Dihms 11 acres 3 roods and 10 poles, by deed bearing date March 11th, 1861, recorded in deed book No. 3, page 267, March 30th, 1861, records of Wirt County. There is no judgment liens, lis pendens, trust deeds, or taxes delinquent

on the above-described tract of land; the record is entirely clear, from my own examination.

R. E. PHELPS, *Att'y.*

WIRT, C. H., *Jan. 30th*, 1865.

The foregoing abstract is correct so far as the records of my office. Given under my hand and official seal this 30th day of January, 1865.

[L. S.] C. B. FISHER,
Recorder of Wirt Co.

[5 cents U. S. R. S.]

Deposition of C. B. Fisher.

Deposition of C. B. Fisher, taken before Berry F. Stewart, a notary public, within and for the county of Wirt, and State of West Virginia, at Elizabeth, in said county and State, on the second day of April, A. D. 1869.

C. B. FISHER, a witness of lawful age, being sworn and examined on the part of the defendant, deposeth and saith:

Quest. 1st. By defendant's counsil.

Are you acquainted the parties to the suit or either of them?

Ans. I am slightly acquainted J. J. West, the defendant.

55 I am not personal'y acquainted with either of the complainants but have had cor'espondence by letters with Mr. Kimble.

Quest. 2d. State wheather or not you have any knowledge of or acquaintance with a certain tract of land situated in Wirt County, West Virginia, on the waters of the Little Kanawha River, at or near the mouth of Rock Run, formerly the property of J. J. West, and wheather you are recorder of Wirt County, and have or have not recorded a deed of the same for any person?

Ans. I never saw the tract of land referred to but I am recorder of Wirt County, West Virginia, and have been since July 1863. I recorded a deed of the tract of land, from James J. West to R. P. Elmore, situated on the Little Kanawha River, three miles above the Burning Springs, at the mouth of Rock Run.

Quest. 3rd. State wheather or not you ever, as recorder of Wirt County, certified an abstract of a title to said land, and if so, when and at whose instance?

Ans. I, as recorder of Wirt County, certifyed to an abstract of the title of said land, I think it was in the month of January, 1865; I think it was at the instance of R. E. Phelps.

Quest. 4th. State, if you know or not, what was R. E. Phelps' avocation and usual business at that time and *whear* he resided?

Ans. He claimed to be an attorney at law, and his usual business was that of an attorney at law; about that time he was speculating in land—examining titles to land; he resided here at Elizabeth.

56 Quest. 5th. State, if you know or not, for *whome* he made the abstract of the title to the land above-mentioned, to which you certifyed and in whose handwriting said abstract was.

Ans. I do not know for *whome* the abstract was made. The abstract was drawn up by Mr. R. E. Phelps and was in his handwriting.

Quest. 6th. State wheather or not you have ever seen said abstract since you certefyed to the same; and if so, when and in whose possession?

Ans. I saw the abstract some time in December, 1868, or January, 1869, and it was in the possession of J. Z. Hunter, esq., who is now acting as attorney for complainants in taking this deposition.

Quest. 7th. State wheather or not the land-book' containing the assessment of land for the purpos' of State and county taxation are deposited and kept in the recorder's office in the county in which the land is situated.

Ans. A copy of all the land-books pertaining to the assessmen' of land, made previous to the formation of the State of West Virginia, are deposited in the recorder's office in the county in which the land lies. Since the formation of the State of West Virginia a copy of said books are deposited with the clerk of the bo'rd of supervisors. The original books are kept by the assessor.

Quest. 8th. State wheather or not the fact is that the copy of the land books intended for the clerk of the bo'rd of the supervisors of the county has not always, since the foremation of this State, been kept in the recorder's office of this county?

Ans. They have not always been kept *their*. They have, with the exception of the years of 1864, 1865, and 1866; most of the time during those years they were *their*.

57 Quest. 9th. State wheather or not tax deeds and the facts going to make up the record of tax titles to land in this State and county are to be found in the recorder's office where the lands lie.

Ans. The deeds going to make up the record of tax title to land in this State are found in the recorder's office.

Quest. 10th. Do or do you not recol'ect who presented the deed, made by James J. West and wife to R. P. Elmore, to you in your office for the purpos' of record*ation*, or where?

Ans. I do not recol'ect posatively who presented the deed, but I think it was Mr. Elmore. The deed was recorded on the 27th day of March, 1865, and I think it was presented on that day.

Cross-examination by counsel for complainants:

Quest. 1st. Do you remember of certefying to more than one abstract of title made by R. E. Phelps to the beforementioned land of West.

A. I do not remember certifying to but one.

Quest. 2. Do you or not remember the substance of said abstract, as presented to you by Phelps and certif*y*ed by you?

Ans. I do not remember the particulars of the abstract?

(The defendant, by his couns*i*l, objects to the foregoing question and answer.)

58 Quest. 3rd. Was said abstract correct or not, so far as the records of your office show?

Ans. I think they w*e*ar, so far as I could as'certain from the records of my office.

Quest. 4th. Are or are not lis pendens, or pending suits, in relations to real property ne*s*sessar*a*ly matters of record*s* in the recorder's office; if not, wh*e*ar would the proper*l*y appear?

Ans. I do not know wheather it is ne*s*sessary or not to record them in the recorder's office.

Quest. 5th. Do you not remember the month, in the year of 1864, 1865, or 1866, when the land-books were not kept in the recorder's office?

Ans. I do not rem'ber the month.

Ques. 6th. Do you or not remember of any one besides Phelps examining, in January, 1866, the title of West land.

Ans. I do not remember of any one exam'ing them.

Quest. 7th. Are you or not acquainted with the general character for honesty and integraty of R. E. Phelps; and if you , is it good or bad?

Question objected to by counsel for defendant.)

Ans. So far as I know, his character for honesty and integrity was not very good.

And further deponent sayeth not.

C. B. FISHER.

59 *Deposition of M. L. Lockhart.*

Deposition of M. L. Lockhart, taken before Benj. F. Stewart, a notary public within and for the county of Wirt, and State of West Virginia, at Elizabeth, in said county and State, on the 2d day of April, A. D. 1869.

M. L. LOCKHART, a witness of lawful age, being sworne and examined on the part of the defendant, deposeth and saith:

By defendant counsil:

Quest. 1st. Are you acquainted with the parties to this suit, or either of them?

Ans. I am acquainted with the defendant, James J. West, but do not know that I am acquainted with the complainants.

Quest. 2d. State wheather or not you are now the clerk of the circuit court of Wirt County; and if so, how long you have been clerk?

Ans. I am now the clerk of the circuit court of Wirt County, West Virginia. I have been cleark of said court from the month of August, 1863, continuesly up to the present time, excepting from January first, 1867, to April 20th, 1867, during which time my brother was cleark.

Quest. 3rd. State wheather or not, as such clerk, you are perfectully familier or not with all suits which have been pending in said court during your clerkship.

Ans. As such clerk, I am famil'er with the pendency and records of all suits in said court during the period of my clerkship.

Quest. 4th. As such clerk, have or have you not custody and ex-
60 clusively possession of the records of said court, and the papers in all suits pending therein after the fileing thereof.

Ans. As such cleark, I have custody of the records of said court and the papers in all suits pending therein from and after the fileing thereof.

Quest. 5. Is it or is it not your custom to ex'ibit the record and papers of said court to parties inquiring of and for the same?

Ans. 'Tis my custom and habit to exhibit the record and papers of all suit' to parties inquiring for them.

Quest. 6th. Do or do you not know of a suit in ejectment, instituted by W'm Lynch against James J. West, in said court; and if so, when was it brought?

Ans. It appears from the officer's return endorsed upon the declaration of W'm Lynch, the plaintiff in a suit in ejectment, that he, Lynch, did institute such a suit against James J. West in the circuit court of Wirt County, and that said offiser duly served a copy of said decleration on the defendant, James J. West, on the 21st of February, 1860. And it further appears from the notice appended to said declaration, that it was made returnable on the first Monday in March, 1860. And

it further appears, that it was filed in said court at March rule of the same year.

Quest. 7th. State wheather or not you recol'ect of any person or persons coming to the cleark's office of said court at any time during
61 the latter part of the year 1864, or the former part of the year 1865, and enquiring of you for the records of and papers in said suit of W'm Lynch against James J. West; and if so, when and who they wear?

Ans. Some time in the latter part of 1864, or the early part of 1865, some persons—I think *their* was more than one—came and asked me to show them the record and papers of said suit of W'm Lynch against James J. West; I do not now recol'ect who they wear, but I well recol'ect of the circumstance of their coming their and making such enquiry.

Quest. 8th. Did you, or did you not, exhibit the records and papers in said suit to said persons at the time refur'ed to?

Ans. I did exhibit the record and papers of said suit to said persons at the time refur'ed to.

(The two foregoing questions and answers the complainant's counsel as being irrelevant.)

Quest. 9th. State if you know wheather or not said persons were making an abstract of the title to a tract of land then claimed by James J. West, and in relation to a portion of which the controversy out of which the suit of ejectment refur'ed to grew; and if so, wheather you reccol'ect of certifying to such abstract?

Ans. My recol'ection is, that they were examin*inying* the *till* to the land, but wheather for the pu'pos' of making an abstract of the title or
62 not I do not recollect, but they were examining the title for some purpos', and I do not recol'ect of certifying to an abstract from the record of in relation to the title of said land, but I may have don' so.

Quest. 10th. Do you recol'ect wheather or not R. E. Phelps forme'ly an attorney residing in Wirt County, was one of the persons who came to your office at the time above refur'ed to, for the purpos' of examining the record and papers in the suit above refured to?

Ans. I do not recol'ect wheather R. E. Phelps was one of the pursons or not.

Quest. 11th. Do you recol'ect wheather or not you exhibited a report and plat of survey made and fil'd in the papers of said suit of Lynch against West, to the persons who were enquiring after the record and papers of said suit, at the time above refur'ed to?

Ans. I did exhibit to the persons so enquiring at the time refur'ed to, a report and plat of survey made by the surveyor of Wirt County, in pursuance of an order of court, filed with the papers in the case of Lynch against West.

Quest. 12th. Do or do you not know who was the attorney or attorn*ies*, mark'd, of record for James J. West, in the suit of Lynch against West, in ejectment, in circuit court of Wirt County, above refer'ed to in this deposition?

Ans. I know that R. S. Brown, esq., was the attorney for West in the circuit court, and was so marked of record, and he was the only one, as far as the record shows, or I know.

63 Quest. 13th. Do you recol'ect, or not, when said case of Lynch against West was tried, and were you clerk or not, at the time?

Ans. I do recol'ect when the suit was tried, and was clerk of the court at the time, empan'eled the jury, an' performed all others duties of clerk of the court in relation to the trial.

Quest. 14th. Did R. S. Brown, esq., or did he not, make any defence as attorney for West, in the trial of said suit?

Ans. R. S. Brown did not mak' any defence, as attorney for West, in the trial of said suit.

Quest. 15th. State wheather or not their was any defence made on behalf said West by any one on the trial of said suit, and wheather either the said R. S. Brown, esq., or James J. West was present at said trial?

Ans. Their was no defence made by any one on behalf of West, on said trial, to the best of my recol'ection; R. S. Brown, esq., was present, but I did not see West, or know of his being here.

Cross-examination:

Quest 1st. By counsil for complain'ts. What is R. S. Brown, esq., present oc'upation?

(The foregoing question objected to by counsil for defendant.)

Ans. He is reported to be a judge of the tenth judicial circuit of West Virginia.

64 Quest. 2nd. How far does he reside from the place of the taking of this deposition?

Ans. It is called thirty miles.

Quest. 3rd. Is or is not your recol'ection distinct in relation to the time when the persons refer'ed to in your direct examination as calling at your office to examin' the records and papers in the suit against Wirt by Lynch.

Ans. My recol'ection is not distinct as to the month.

Quest. 4th. Was or was not R. S. Brown, esq., attorney of record for West up to the time of the verdict in the suit of ejectment of Lynch against West?

Ans. He was.

Quest. 5th. Was or was not the cace *tride* by a jury?

Ans. *Their* was a jury empan'el'ed, and a verdict rendered.

Quest. 6th. From your acquaintance with, and from the general reputation of R. E. Phelps, refer'ed to in your examination-in-chief, could or could not he have been induced, by a pecuniary consideration, to have made a fals' and fraudulent abstract of title for the purpos' of deceiving and defrauding parties relying thereupon?

(The defendant, by his counsil, objects to the foregoing question.)

65 Ans. I do not know what he could been induced to do. I do not think I would be war'ented in saying that he could.

Quest. 7th. Is Phelps' reputation, as far as you have heard, good or bad as to honorable dealings?

(The defendant, by his counsel, object' to the foregoing question.)

Ans. For some time after my acquaintance with Phelps his reputation, so far as I heard, was good as to honorable dealings; but afterward his reputation for honor'ble dealings, so far as I heard, was bad.

Quest. 8th. Do you know *whear* Phelps now resides?

Ans. I do not.

Quest. 9th. When he left this section of country, was it generally known that he was going, and where he was going?

Ans. I did not hear anything said about it.

Quest. 10th. *Wear* you a resident of Elizabeth when Phelps came to Elizabeth, and while he remained *their*?

Ans. I was.

Question 11th. How long did Phelps reside in Elizabeth?

Ans. I think about two years.

Quest. 12th. Was or was not Lynch non-suited in his ejectment suit against West? and if yea, state what record of your office shows in relation to the same.

66 Ans. He was non-suited at the December term of the court of 1863, and, after argument of counsil at the June term of court 1864—being the next term of court that was holden after the December term, 1863—the case was, by order of court, reinstated upon the docket.

Quest. 13th. From the record does it appear that R. S. Brown, esq., was attorney for West in the suit after its reinstatement upon the docket?

Ans. It so appears.

Not being able to complete the taking of said depositions, by reason of not having time to take the same, I adjourn the further taking of the same until Friday, April 2d, then to be continued at the same place, and between the same hourse mentioned in the annexed notice.

BERRY F. STEWART,
Notary Public.

Pursuant to the adjournment, as above stated, on the 2nd day of April, 1869, between the hours of 8 o'clock in the forenoon and six o'clock in the afternoon, at the law office of D. H. Leonard, esq., in the town of Elizabeth, I continued the taking of said depositions, viz: J. L. Hunter, esq., for complainants; for defendant, James J. West, W'm C. Stewart, esq.

Quest. 14th. State wheather or not a lis pendens, such as this suit in ejectment of Lynch against West, would properly appear on the record of your office, and wheather or not that would be the place to look for such an incumberance to any real property.

Ans. From the papers on file in my office a pending suit
67 at law, such as the ejectment suit of Lynch against West, would properly appear.

Quest. 15th. State wheather or not there were in the latter part of the year 1864, and the early part of the year 1865, many persons coming daily to your office to examin' your records as to titles.

Ans. *Their* was a good many.

And further deponent sayeth not.

M. L. LOCKHART.

Deposition of William H. Kimball.

Deposition of William H. Kimball, taken before Samuel Jennison, a notary public within and for the county of Suffold, in the Commonwealth of Massachusetts, at Boston, in said county and State, on the eighteenth day of January, A. D. 1869.

WILLIAM H. KIMBALL, a witness of lawful age, being sworn and examined on the part of the defendant, deposeth and saith:

My name is William H. Kimball; I am of the age of thirty years and upwards; reside in the city of Boston, State of Massachusetts. I am one of the plaintiffs in this suit. Myself and G. D. S. Trask, also plaintiff, own all the interest obtained by Mr. West's deed to R. P. Elmore, of date January 31st, 1865. When Elmore took that deed he was doing it as the agent of myself and Trask. Myself and Trask

furnished the whole amount paid therefor, namely, twenty-two thousand dollars. The said R. P. Elmore held the land for us, and as our agent, till May 9th, 1865, when, by his deed of that date, he, for the
68 nominal consideration of ten thousand dollars, conveyed to us. This conveyance was made in order to complete his agency for us, the said Kimball and Trask. The ten thousand dollars named as consideration in said conveyance was merely nominal, and never passed, neither did any part of said sum, as a consideration for said conveyance; but the transaction was one entirely of principal and agent. Before the purchase of said land, I was on it, and we—myself and Trask—concluded to buy it, if a good title could be had, and such were our instructions to our agent, Elmore. The most valuable part of said tract is that recovered by W'm Lynch; it is the best timbered. It is the best land; the most tillable; has the house and orchard upon it; lies the best, in all respects—for all purposes. It was more for this part of the tract that we concluded to purchase; without this the remainder would be valueless and unsaleable. Just before the purchase of said land I met West, and asked him if he could give a perfect title to the land. He said no better title could be got to any land; it was perfect and good in all respects. I think West knew I was one of the parties interested in said purchase, and was furnishing money for said purchase. I never knew of the suit of Lynch till long after he had obtained judgment, &c. When I learned the fact, I immediately investigated the matter, and found that West had been guilty of fraudulent representations in the sale of said land to me, through our agent Elmore; that his title was not as represented by him—good and perfect in all respects. I immediately gave orders to our attorneys in this case to commence these proceedings against West. I did not know when
69 West left West Virginia, nor where he had gone till I discovered the defect in title, and was led thereby to inquire after him. At the time I discovered this defect I was going to put a man in possession of the place; had never taken possession, but supposed that West was living on the premises. Capt. G. D. S. Trask, plaintiff with me in this suit, residing in the State of New York, went to Europe soon after the purchase of this land, and was gone some time, and he knows little or nothing about the land. I have been the active partner in the transaction. At the time I saw said West he produced and showed to me an abstract or statement of title to said land, signed by R. E. Phelps, a lawyer, who had made the same out for said West, which abstract or statement shewed that there were then, at its date, Jan'y 30th, 1865, no judgment-liens, no lis pendens, trust-deeds, or delinquent taxes against said land; and it further said, "the record is entirely clear as from my own examination." This abstract was shown to me by West as true and correct, and I relied upon it as such in any and all instructions I subsequently gave our agent, R. P. Elmore, as to purchasing said land. I suppose' West to be an honorable and fair-dealing man at this time.

W'M H. KIMBALL.

Deposition of Lyman Elmore.

Deposition of Lyman Elmore, taken before Geo. W. Paine, a notary public within and for the county of Kings, and State of New York, at Brooklyn, in said county and State, on the 23rd day of December, 1868.

LYMAN ELMORE, being first carefully examined and sworn to testify

70 the whole truth of his knowledge touching the matters in issue in said cause, doth depose and say:

I reside in the city of Brooklyn, county of Kings, and State of New York, and am an attorney and counsellor at law. I know the parties to this cause, and the subject-matter involved therein. In January, 1865, I think 26th of the month, I, in company with William H. Kimball and Gustavus D. S. Trask, the plaintiffs in this action, went to see J. J. West, the defendant in this action, about purchasing the farm or property now in d spute between said plaintiffs and said defendant. I was acting at that time as a sort of adviser for the plaintiffs. He, West, agreed to sell the farm or property aforesaid to the plaintiffs for $22,000. He at first asked $25,000. He said the title was perfect in him; that there were no claims or liens of any name or nature upon it. He produced a patent to show his title. I told him that was not a sufficient proof of a title and that the land was free from all incumbrances. I told him he must get an abstract from the records, showing a perfect and clear title in him, before the plaintiffs would purchase. This was the substance of the conversation between the plaintiffs and defendant, and myself. We then left and went to Burning Springs, about six miles from said West's. The plaintiffs then agreed and authorized R. Palmer Elmore to act as there agent in the purchase of said property, if said West could give a clear and perfect title. Afterwards said West showed me, at Burning Springs, an abstract of title to said property, signed by R. E. Phelps, attorney, and dated January 30th, 1865, and certi-

71 fied by the recorder of Wirt County to be correct so far as the records of his office . By which abstract it appeared that there were then, January 30, 1865, no judgment-liens, no lis pendens, trust deeds, or delinquent taxes against said lands, and it further appeared & said "the record is entirely clear as from my own examination." Phelps was at that time acting as West's lawyer. I examined this abstract, and supposing there was no deceit or fraud about it, I advised R. Palmer Elmore, plaintiffs' agent, that the title was good in West, and that the property was free from all incumbrances of every name and nature, and upon the strength of that abstract, R. Palmer Elmore, acting as plaintiffs' agent, did purchase said property and pay the consideration named in the deed therefor, which consideration so paid was the money of the plaintiffs, William H. Kimball and Gustavus D. S. Trask. I did not at that time know of any suit by William Lynch against said West, involving this land, neither did West, or his attorney, inform me of any such suit. If I had known of any such suit I should not have advised R. Palmer Elmore to purchase said property for said plaintiffs, as they had distinctly stated that they must have a perfect title.

Some time afterwards I learned, by hearsay, that the title to the property was imperfect, but not the nature of the imperfection. Meeting West soon after this, I mentioned to him what I had heard of the title being imperfect; he laughed, and said the purchasers would have to sell by the same abstract as they had bought by, as they would not be able to come it over Fisher, the recorder, as they had, (meaning himself & Phelps.) He also said he thought he deserved credit for "coming it" over a New Yorker. He said he had got the money, and they

72 could do as they pleased about it. I did not know at that time the nature of the incumbrance, and never did know until after Lynch obtained judgment, not till the year 1867, and West had left. I supposed if the title really proved defective, that he would make it good, as he told me he was going to buy a farm in Mason County, West Virginia; so I paid no attention to the matter afterwards. After the

deed from West to R. Palmer Elmore, plaintiffs' agent, was delivered, said West agreed with said Elmore that he, said West, should keep possession of said property until the plaintiffs should desire to occupy it, but he paid no attention to this agreement, but went away, I knew not where, nor exactly when. I do not think that the plaintiffs knew of the existence of the Lynch suit till long after judgment—in fact, I am very sure they did not, because they were not out in that country, and I know R. Palmer Elmore, their agent, did not know of it. I spoke to West before the purchase of this property, in relation to delinquent taxes; he said there was nothing of this kind against the property; that he always kept the taxes paid up. I was present when the deed from R. Palmer Elmore to the plaintiffs, Kimball & Trask, was given, and I know that said deed was given merely in furtherance of said Elmore's agency, and that the consideration named, $10,000, was merely nominal, and no money or other valuable consideration passed between them for the deed.

I have been on this property, and cannot see how 184 or 164 acres could be taken out of it without destroying its marketable value. I do not know what portion of the tract Lynch recovered. If it had not
73 been for the abstract signed by Phelps and Fisher, I should have had an examination of the title made. The purchase was made entirely upon this abstract. Mr. Phelps was present when West showed me the abstract before mentioned. It was in Phelps' handwriting, & dated Jan. 30, 1868, & certified to be correct by the recorder.

LYMAN ELMORE.

Deposition of W'm Lynch.

Deposition of William Lynch, taken before W. W. Van Winkle, a notary public within and for the county of Wood, and State of West Virginia, at Parkersburg, in said county and State, on the second day of January, A. D. 1869.

WILLIAM LYNCH, being first carefully examined and sworn to testify the whole truth of his knowledge touching the matters in issue in said cause, doth depose and say:

My name is William Lynch. I am fifty-one years of age, and by occupation, a farmer. I live in Gilmer County, West Virginia. I am acquainted with James J. West, formerly of Wirt County, West Virginia, now of Missouri. I am well acquainted with the land supposed to be conveyed by West to one Elmore, agent for the plaintiffs in this suit. I know every foot of said tract. The tract so conveyed contains four hundred acres; said conveyance was made as near as I can recollect, about the first of the year eighteen hundred and sixty-five. I brought suit for a portion of said land, being about one hundred and eighty-four acres, according to the plat and survey of H. M. Lawther, appointed by the circuit court of Wirt County, West Virginia, to survey and
74 plat said land. West was duly served with process, and appeared and defended the suit by counsel. At the time of West's deed to Elmore, the suit had never been tried, but was then pending in court. I was at the court just previous to the making of said deed to Elmore, and met West. He come to me and said he had a chance to sell the land to one Elmore, if he could give a perfect title, and he wanted to buy up my claim. I told him I should certainly recover, but I would drop the suit for sixteen hundred dollars, each party to pay his own cost. He offered me fifteen hundred dollars, but finally agreed to give me

sixteen hundred. It was the agreement and understanding that the suit should remain on the docket until the sixteen hundred dollars was paid; then it was to be dropped, and I was to give him a deed of the part claimed by me. He said in a few days he would pay it, as he was to get the money from Elmore for the place. He was to come to my house and pay me. R. E. Phelps knew of this suit at this time. I had talked with him about it, and he gave me the impression that West's title was not good as against mine. West never came to my house to pay said sixteen hundred dollars, and never paid it at all, and I never saw him until the past summer, and never heard from him directly. I heard he had gone to Missouri, nothing more. Shortly after West made the deed to Elmore, I knew of it and inquired after West to get my money, but he had gone to Missouri and left no property in the State of West Virginia, but took everything with him. After he had gone, I was told by one of his friends that he had had a letter from West, and he said though he had taken my money with him, he
75 had left the land. This was the first knowledge I had of his whereabouts. West having failed to comply with his agreement, I prosecuted the suit to judgment, which I obtained in eighteen hundred and sixty-six, April, I think. He had no counsel. His counsel said he had left without paying him, and he should not act for him longer. His counsel in the case was one Brown, now a judge of one of the circuit courts of West Virginia. The land I took possession of immediately, and have held possession ever since. I consider the part recovered by me, the most valuable of the whole four hundred acres. It is the best timbered; there is very little timber on the residue. It is the most tillable and lays the best for all purposes. It has the house upon it, and the orchard. I should not consider the other part desirable or valuable without this. All the tillable portion of the residue is small and worn out or exhausted, and there is a large bluff of rocks that runs very nearly the whole length of it. I was never acquainted with Lyman or R. P. Elmore, or either of the plaintiffs in this case; never had any conversation with them, nor never notified them of my suit. I never knew how much West was to receive from Elmore; don't know to this day. Neither Elmore nor the plaintiffs were ever in possession of said land. I never had any understanding of any name or nature with either of the Elmores *on* the plaintiffs or any attorney of theirs in relation to the suit against West. I do not consider that I ever conveyed to said West my title in said four-hundred-acres tract. On the first day of August, A. D. 1868, West came to me and said he wanted to get my title to the land, as there might be trouble about it some day, as he had given a warranty deed of it. He said there
76 were no suits then, but there might be sometime. I re*fused* to the way he had treated me. I then agreed to take one thousand dollars and give him a deed. He agreed to give this, and paid me four hundred dollars that day. I had a warranty deed made and deposited in the hands of Harrison Cain, brother-in-law of said West, said deed to be given up when the remaining six hundred dollars should be paid. By said agreement said six hundred dollars was to be paid on or before the first day of December, A. D. 1868. Said West never paid or caused to be paid said remaining six hundred dollars, and I have never received the same from any person, and if said deed ever came into the possession of said West, it has been contrary to said agreement. I have heard that said Harrison Cain had given up the deed to be recorded. This was contrary to our agreement. West sent me word that he had had the deed recorded, and that was all he wanted; if I wanted anything

more I could come to Missouri and law him for it. Said agreement was in writing, and signed by myself and said West, under seal, and witnessed by Levi Johnson. I produce the original agreement here, and request the notary public before whom this deposition is taken, to make and annex hereto a copy thereof. If said West, by the fraud and deceit he has practised, has obtained any title to said property recovered by me by my suit in ejectment, I shall avail myself to all legal remedies to regain it. And further the deponent saith not.

WM LYNCH.

The article of agreement referred to in the foregoing deposition is in the words and figures following, to wit:

77 *Article of agreement between W'm Lynch and James J. West.*

Article of agreement, this first day of August, 1868, made and entered into between William Lynch and Jas. J. West, as follows, to wit: The said Lynch has this day sold and conveyed, by deed dated and acknowledged this day to the said West, a certain tract of land lying in Wirt County, State of West Virginia, containing 164¾ acres, and has, in said deed, acknowledged the receipt of the payment of one thousand dollars, but has received but four hundred dollars in hand, the other or ballance of $600 still remains unpaid; it is hereby agreed by and between the parties that the deed aforesaid is to remain and be held by Harrison Cain until the remaining six hundred dollars shall be paid, and so soon as the said six hundred dollars is paid, the said H. Cain is to deliver to the said West the deed aforesaid, which is to be paid on or before the first day of December, 1868.

Witness the following signatures and seals.

(Signed) W'M LYNCH. [SEAL.]
(") JAMES J. WEST. [L. S.]

Teste:
LEVI JOHNSON.

[50c. U. S. int. rev. stamp.]
[5c. U. S. rev. stamp.]
[5c. U. S. rev. stamp.]

Deposition of Ja's M. Jackson.

Deposition of James M. Jackson taken before W. W. Van Winkle, a notary public within and for the county of Wood, and State of West Virginia, at Parkersburg, in said county and State, on the second day of January, A. D. 1868.

JAMES M. JACKSON, being examined and sworn to testify the whole truth of his knowledge touching the matter in issue in said cause, doth depose and say:

78 I am an attorney and counsellor at law, residing at Parkersburg, Wood county, West Virginia, duly licensed to practise in the several courts of said State. I practise in the county of Wirt, and have done so for the last twenty years. I prosecuted an action of ejectment in the circuit court of Wirt County, brought by William Lynch, to recover from James J. West a piece or parcel of land in said county, containing about 184 acres. I was present at the trial of said case, at the April term, 1866, of said circuit court of Wirt County, managed the

case for said Lynch, and procured for him the recovery & judgment had in said suit. Neither at said trial or prior thereto, was this deponent informed of any arrang'ment or agreement between the said Lynch and said West, or his agents and attorneys, in regard to said recovery, nor was this deponent ever informed of any such arrang'ment with W'm H. Kimball or any other person whatever. Deponent was never informed by his client W'm Lynch as to any, if any such ever existed; Lynch was pressing a trial in said cause for several courts, on the merits of the case, and, so far as this deponent is informed, always relied upon the strength of his title to recover therein. This deponent became acquainted with said Kimball long subsequent to the trial of said case. At the time it was tried he did not know there was such a person, or that he had any interest whatsoever in said land, or set up any claim thereto; said Kimball was not present at said trial, nor was he, so
79 far as deponent knows, in this country at that time. Deponent had no consultation with any one about said land, except his client Lynch, and deponent believes that everything was conducted in a perfectly fair and legal manner, and according to the forms and usages of law in this State. As to said Kimball's partner G. D. S. Trask this deponent has no knowledge whatsoever, having no knowledge of ever having seen him. This deponent is well acquainted with C. B. Fisher, recorder of Wirt County, and was also acquainted with R. E. Phelps, when he resided in Wirt County. He was only a resident for a short time, and claimed to be an attorney at law, but had no standing at the bar, and, this deponent believes, never qualified in court as an attorney; was wholly unacquainted with our laws, without any character or legal reputation as a lawyer, and was regarded by the profession and others as an adventurer, who was induced to come to Wirt County by the oil excitement, which was prevailing in that county at that time. When this subsided he left, and this deponent knows nothing of him since that time, although it is the common rumor that he fled the country, abandoning a young wife that he married while there. Deponent would not regard his legal opinion as of any value, nor place any confidence in his certificate of the title to land in this State.

Deponent further states that the suit before referred to was in the circuit court of said county of Wirt, and would in no wise appear as of record in the recorder's office of said county, and the said recorder might well be ignorant of the existence of such suit, his office being
80 entirely distinct and separate from the office of the clerk of the court, and his duties not requiring him to have any cognizence of the transactions of the court officially.

Deponent also knew Ja's J. West before he left this country; said West was well acquainted with members of the bar practising in the courts of Wirt County, and could easily have obtained a legal opinion and certificate from some one of them as to the title to said land. That it was the duty of the attorney who was passing upon the title to said land to have examined the clerk's office of the court as to any suits against the same, before giving a certificate of its being unencumbered and not in litigation, if he was at all acquainted with the forms of law and practise in this State, and deponent believes that if said West had applied to any of the resident lawyers of the State, practising in said county, for a certificate, such certificate would have shown the pendency of the ejectment of Lynch vs. West in said court. And further this deponent saith not.

JA'S M. JACKSON.

Deposition of J. B. Jackson.

Deposition of J. B. Jackson, taken before Barna Powell, a notary public within and for the county of Wirt, and State of West Virginia, at Parkersburg, in said county and State on the fifth day of April, A. D. 1869.

J. B. JACKSON, of lawful age, being by me duly examined, cautioned, and sworn, deposes as follows:

81 I am 40 years of age; an attorney and counsellor at law, residing in the city of Parkersburg. Some time in the month of March, in the year 1865, Lyman Elmore, R. P. Elmore, and J. J. West came into my office in said city to close up the purchase of a tract of land purchased by R. P. Elmore of West, in Wirt County, West Virginia, and to submit to me the deed executed by West to Elmore for my opinion as to whether the deed was sufficient to pass the title from West to Elmore to said land. The deed was handed me by one of the Elmores, and after I had examined the deed I gave it as my opinion that the deed was good and sufficient to pass the title. I am of opinion that the abstract was also shown me, but of this I am not certain. If shown me I gave no opinion as to it, as I was not acquainted with the title. I am certain that nothing was said in my presence about any incumbrance of any kind on said land. After the deed was delivered to Elmore he proceeded to pay West the residue of the purchase-money unpaid on said land. The amount was calculated, and when ascertained he drew checks on the First and Second National Banks of Parkersburg for the same, according to my recollection, amounting in all on both banks to upwards of $17,000 00, which checks were handed to West, Elmore retaining the deed; and the parties left together. And further this deponent saith not.

J. B. JACKSON.

Deposition of WILLIAM LYNCH, taken before M. H. Stump, a notary public within and for the county of Gilmer and State of West Virginia, at Glenville, in said county and State, on the 22d & 23rd days of March, A. D. 1869.

82 *Deposition of W'm Lynch, taken on part of defendant.*

WILLIAM LYNCH, of lawful age, being sworn and examined on the part of the defendant, deposes and sayeth:

Question 1st, by defendant. Pleas' state your name, age, residence, and avocation, and whether you are acquainte' with the defendant and R. P. Elmore, and whether you are or are not acquainted with the complainants.

Answer. My name is William Lynch; I am 51 years of age; I resid' in Gilmer County, and State of West Virginia; I am a farmer; I am acquainted with the defendant West; I am not acquainted with R. P. Elmore, nor am I acquainted with the complainants.

Question 2d, by same. Are you acquainted with the tract of land in controversy conveyed by the defendant West in 1865 to the said R. P. Elmore, and are you the same person who was plaintiff in the ejectment suit against James J. West, the defendant, pending at the time of the sale from West to Elmore, for the recovery of a part of said tract?

Answer. I am acquainted with the land in controversy. I am the same person named in the suit of ejectment against the said James J.

West, defendant, pending at the time of the sale from West to Elmore for the recovery of a part of said tract.

83 Question 3rd, by same. State whether you ever had any conversation with said Elmore or his attorney prior to the payment of the purchase-money from Elmore to West, in regard to the title of said land? If so, state what the conversation was.

Answer. I never had any conversation with Elmore. I don't know that I ever saw him. I cannot say who was his attorney. I had a conversation with a man by the name of Phelps, who represented himself as being the attorney for Elmore. I was talking with Phelps about the matter, and I asked him to see Elmore for me and till him for me not to pay over the money till I got my pay from West. He then said that he was Elmore's attorney, and had apprised him, Elmore, of the ejectment suit pending against a part of the land. This conversation took place at Elizabethtown, (Wirt court-house,) at a time of court for said county of Wirt.

Question 4th, by same. State how you came to approach Phelps at the time of the aforesaid conversation.

Answer. I just casually fell in with Mr. Phelps, he being a man that I was acquainted with. I understood that he was a lawyer.

84 Question 5th, by same. State what you *done* after your recovery on the ejectment suit towards taking possession of the land, and whether you ever did take actual possession of it?

Answer. I came up and put two of the Mr. Knights in possession of the land. They *was* to repair the house on the land and keep off trespassers and have the use of the cleared land.

Questi'n 6th, by same. How much cleared land is there on the land you recovered?

Answer. I don't know, but should think there is from 7 to 10 acres.

Question 7th, by same. State whether the Messrs. Knights ever moved on the land, and whether they ever *done* the repairs y' speak of, or ever paid you anything.

Answer. I don't think they ever moved on the land or did the repairs to the house, neither did they pay me anything, but they told me that they were keeping off trespassers, as I saw them about it occasionally. My impression is, that they raised oats in the field across the road from the house, a part of which field recovered—say about three-fourths. This was the first season after I recovered.

Question 8th, by same. State whether you ever put any person in possession of the land befor' your recovery.

Answer. I did not, or take charge of it.

85 Question 9th, by same. State whether you sold the land you recovered in the suit of ejectment to defendant, West; if so, state the time; and whether you have conveyed the same to him.

Answer. I have sold the land to defendant, West.

Question 10th, by same. State whether the deed here filed as Exhibit No. 1, with these depositions, and made a part thereof, is the deed made by you to defendant, West; and whether this deed was intended to, and does, convey to West all the land claimed by you in the tract sold by West to Elmore.

Answer. This is the same deed, and conveys all the land I recovered from West.

Question 11th, by same. State what the contract was between you and defendant, West, when the deed was made, and whether all the purchase-money from West to you has been paid on the said contract.

Answer. The contract between me and West was that the said West

was to pay me one thousand dollars for said land; this was on the 1st day of August, 1868; he paid me four hundred dollars at that time; the remaining six hundred dollars he was to pay me on or before the 1st day of December, 1868. The article of agreement hereto attached and made a part of these deposition, and marked as Exhibit No. 2, con-
86 tains the contract between me and West at that time. Defendant, West, has paid me on this day (22d March, 1869,) the balance of the said thousand dollars, with its interest.

Question 12th, by same. What was the character of the whole 400-acre tract of land sold by West to Elmore, and also of that part recovered in the ejectment; was it esteemed as promising for oil as the remaining part of the tract, and whether it is as valuable for agricultural or other purposes as the remaining part of the 400-acre tract?

Answer. I regard the whole tract as being a pretty rough tract of land. The part recovered lies a little back from the river and creek, on a small run; it lies better than the other part of the tract for agricultural purposes. It was not esteemed as highly for oil purposes as the remaining part of the tract. It is better timbered than the remainder of the tract.

Question 13th, by same. What price did you ask for that part of the tract (you have since recovered on the writ of ejectment) at the time of the sale from West to Elmore?

Answer. I agreed to take sixteen hundred dollars of Mr. West.

Question 14th, by same. State, if you know, what Elmore gave West for the whole tract, and when the money was paid.

87 Answer. I cannot say that I know; I have heard from other parties that he was to pay twenty-two thousand dollars. I do not know when the money was paid.

Question 15th, by same. Was there ever any collusion between you and West in regard to the sale of the land by West to Elmore for the purpose of defrauding said complainants, and the abandonment of the occupation of said lands to the plaintiffs' prejud'ce?

Answer. There was not.

Cross-examined by complainants:

Question 1st, by same. How long have you known defendant, West?

Answer. I think about ten or twelve years.

Question 2d, by same. Are you acquainted with the complainants in this suit?

Answer. I am not.

Question 3rd, by same. Did you know, except from Phelps's own representation, that he was attorney for Elmore?

Answer. I did not.

Question 4th, by same. Had you any reason whatever, excepting his own word, for supposing him to be such?

88 Answer. I had not.

Question 5th, by same. Did you know Phelps to be a practicing attorney at the bar?

Answer. I cannot say that I did; I never k'ew of him having a case in court.

Question 6th, by same. Did he or you first mention the suit of ejectment against West in the conversation refer'ed to by you in your direct examination?

Answer. I first mentioned it to Phelps, and asked him as a favor to me to see Elmore and tell him not to pay over the money to West till I got my pay from West.

Question 7th, by same. What was the understanding between you and West in relation to the pay spoken of; what was it the pay was to be for?

Answer. The agreement between me and Mr. West was that Mr. West agreed to give me sixteen hundred dollars if I would drop the suit and make him a deed for the land in controversy betwixed me and West; when Elmore made a payment to West he, West, was to come up to my house and pay me, and get his deed, and the suit was then to be drop'ed.

Question 8th, by same. Did he, West, comply with his agree-
89 ment aforesaid.

Answer. He did not.

Question 9th, by same. Have you made a subsequent agreement with said West about the purchase of the land, recovered in your ejectment suit, and did he fulfill his part of said contract or agreement?

Answer. I did make a subsequent agreement with him about the purchase of said land. West came to me the last day of July, 1868, and proposed buying this land, and he and I agreed upon a price, (one thousand dollars.) The next day I came to Glenville as I agreed; I executed a deed to Mr. West, the same deed that is made a part of my examination-in-chief, which deed was placed in the hands of Harrison Cain, according to the written agreement made and marked Exibit No. 2 in my examination-in-chief, to be kept by him until the remaining six hundred dollars was paid.

Question 10th, by same. When was the ballance, six hundred dollars, paid?

Answer. It was paid to-day, 22d March, 1869.

Question 11th, by the same. When was 'aid deed given up to said West?

Answer. To-day, March 22d, 1869.

90 Question 12th, by same. Did you ever give any person any authority to have said deed recorded?

Answer. I did not intend by anything that I said or *done* to pass the title to said land, until I got the ballance of the purchase-money.

Question 13th, by same. Was this deed, while in the hands of Harrison Cain, under the written agreement, put upon record in Wirt County?

Answer. It was not put there by the agreement.

Question 14th, by same. Did you learn soon after the deed was placed in the hands of Harrison Cain that the same had been recorded in Wirt County?

Answer. I heard that it was, or understood that it was.

Question 15th, by same. Was you not surprised when you learned the facts of its record?

Answer. I was rather, and, I believe, I expressed some dissatisfaction to 'Squire Cain when I heard of it, whose hands it was placed in, but, after having a conversation with 'Squire Cain, he reminded me that there had been a coversation about the record*ation* of the deed, but I do not remember what it was, but my distinct recollection is that
91 the deed was to remain in the hands of 'Squire Cain as belonging to me until the remaining six hundred dollars was paid according to agreement, and then it was to belong to West.

Question 16th, by same. Did you not consult legal counsel in order to ascertain what steps to take to get it from the record?

Answer. I did.

Question 17th, by same. Who was present when said deed was placed in the hands of said Cain, August 1st, 1868.

Answer. 'Squire Cain was present, Mr. Levi Johnson, Mr. West, and myself.

Question 18th, by same. Did not Mr. Levi Johnson, in a conversation you had with him in relation to recording of said deed, express surprise at its being recorded?

Answer. In a conversation with Mr. Johnson about it he said that he did not know how 'Squire Cain had understood it so, and refer'ed to the article of agreement.

(To this last question and answer the defendant objects.)

Question 19th, by same. Did you not consider that the deed was to be given up to you by Cain if West failed to pay the balance of the money by the first of December, 1868.

92 (The defendant objects to this question and the answer thereto.)

Answer. My understanding was that the deed rightfully belonged to me after that time, but I did not expect to exact it to a day.

Question 20th, by same. When West came to you the last of July, 1868, to purchase the land recovered by you, did he inform you of this suit?

Answer. He did not, but said there was no suit about it as yet, but if that we could agree upon a price he would rather buy it, from the fear that he would have trouble about it sometime.

Qusstion 21st, by same. Did you not recover in the ejectment su't upon your title?

Answer. I did.

To the above question and answer the defendant object' upon the ground that the record of the recovery is the best evidence.

Question 22d, by same. Was there any collusion between you and the complainants in this suit, or their agent or attorney, to have the defendant, West, defaulted in the ejectment suit or to defraud him in any way?

Answer. There was not.

93 Question 23rd, by same. Could West have given a good title by metes and bound' to the remaining part of the tract while your suit was pending, and before the surveyor appointed by the court had fixed the boundary lines?

Answer. I am not prepared to say.

Question 24th, by same. Did not the part recovered by you have the house upon it, and includ' about all the cleared land?

Answer. It had the house on it. I think it did not includ' more than one-fourth of the cleared land, if that.

Question 25th, by same. Was not the cleared part of the remainder of the tract much exhausted?

Answer. It was.

Question 26th, by same. Did you not consider the part recovered by you necessary to the full and proper enjoyment of the tract?

Answer. Yes, I did.

Question 27th, by same. Is it not most tillable and best timbered of the whole tract?

Answer. It is the best-timbered, and, in proportion to the size of the tract, it has the most tillable land upon it.

94 Question 28, by same. Did you not consider it the most valuable in all respects?

Answer. I do, since oil territory has became worthless; before that time it was not.

Question 29th, by same. From your knowledge of oil-land transac-

tions would a purchaser of oil territory have been likely to have bough this tract, know'ng of the pendance of your suit?

Answer. He would not have been likely to have paid so high a pric for it as he would without any incumbrance on it.

Question 30th, by same. Was not twenty-two thousand dollars for thi tract such a price as would lead you to suppose that the purchaso thought he was getting a good title to the whole tract?

(To this question and the answer thereto the defendant object.)

Answer. It was.

Question 31st, by same. During the pendancy of your ejectment suit and some time after the deed to Elmore, did not the price of land in th vicinity of this tract depreciate greatly?

(The defendant object' to this question as being irrelevent to this caus and as introducing new matter.)

Answer. Yes; it did.

95 Question 32d, by same. Have you not had considerable ac quaintance with oil-land transactions in the State of West Vir ginia?

Answer. Yes, sir; I have.

Question 33rd, by same. Did you know of the complainants, or thei agent or attorney, taking possession of the tract purchased of West soo after said purchase?

Answer. I did not.

Question 34th, by same. How long after the sale by West to the com plainant's agent before West left the State?

Answer. I do not know; it was but a short time.

Question 35th, by same. Did you know of his intention to leave befor he had gone?

Answer. My impression is that I did not.

Question 36th, by same. To the best of your knowledge and belief was not Phelps acting as attorney for defendant West in the sale of thi land to Elmore, complainants' agent?

(To this question the defendant object'.)

Answer. I could not say that he was.

Question 37th, by same. At the time of your agreement with Wes to drop the suit on payment of $1,600, did you not think that he West, desired to keep the same from the knowledge of complainant' agent?

96 (To this question the defendant object'.)

Answer. I saw no disposition on the part of West to do so.

Question 38th, by same. Why, then, did you request Phelps to tel Elmore not to pay over the purchase money to West till you received your sixteen hundred dollars.

Answer. This was after the time had expired that West was to hav com' up and pay me the money and get the deed. I became suspiciou that something might be wrong about it, and I told Phelps to appris the parties that I had not got my money, and that I would not mak the deed till I got the money.

Question 39th, by same. Do you know whether the complainants, o their agent or attorney, knew of or had notice of your suit then pendin and of your agreement with West?

Answer. I do not know of their having any notice of it.

Question 40th, by same. Have you not given one deposition in thi case beside this?

Answer. I have; at Parkersburg.

Question 41st, by same. Do you not intend that this deposition shall conform thereto touching all matters therein deposed?

(To this question the defendants objects.)

97 Answer. I shurely do.

Reëxamined by defendant:

Question 1st, by same.

And further this deponent sayeth not.

W'M LYNCH.

Deed of William Lynch to James J. West, and attached to the deposition of said William Lynch, and referred to as Exhibit No. 1, is in the words and figures following, to wit:

Deed of W'm Lynch & wife to Ja's J. West, dated Aug. 1st, 1868.

This deed, made this first day of August, 1868, between William Lynch and Rochel Lynch, his wife, of the first part, and James J. West, of the second part, witnesseth:

That the said William Lynch, and Rochel, his wife, for and in consideration of the sum of one thousand dollars, lawful money in hand paid, the receipt whereof is hereby acknowledged, doth grant unto the said James J. West the following described tract of land situated in the county of Wirt, and State of West Virginia, and being a part of a four-hundred-acre tract of land formerly owned by said West, and conveyed by said West to R. Palmer Elmer, and being the same land that the said Lynch instituted a suit in ejectment against said West in the circuit court of Wirt County, on the 6th day of April, 1860, which suit was gained by the said Lynch on the 11th day of April, 1866, which is bounded as follows, to wit: Beginning at a hickory, corner to a tract of 248½ acres of land sold by said Lynch to Bailey Knight; thence N. 61 west 157 poles, to an iron-wood; thence S. 30 W. 200 poles,

98 to the original line of said Lynch's survey; thence S. 86 east 238 poles, with the original line, to a beech; thence N. 6 E. to a W. O.; thence N. 15 W. 65 poles, to the beginning, containing one hundred and sixty-four and three-fourth acres (164¾) more or less. And the said William Lynch, and Rachel, his wife, covenants to and with the said West, that they will forever warrant and the above-described tract of land, and further it is expressly understood by and between the parties that this deed conveys all the title that the said Lynch has or ever had to any portion of the above-named 400 acres sold by the said West to R. Palmer Elmer.

Witness the following signatures and seals.

W'M LYNCH. [SEAL.]
RACHAEL LYNCH. [SEAL.]

[50c. U. S. int. rev. stamp.] [50c. U. S. int. rev. stamp.]

STATE OF WEST VIRGINIA,
Gilmer County, to wit:

I, M. H. Stump, a notary public in and for the county and State aforesaid, hereby certify that William Lynch, and Rachel Lynch, his wife, parties to the within deed bearing date the 1st day of August, 1868, personally appeared before me, in my county and State aforesaid, and acknowledged the same to be their act and deed, and I further certify that the said Rachel Lynch, the wife of the said William Lynch, being by me examined privily and apart from her said husband, and having

the deed aforesaid fully explained to her, she, the said Rachel Lynch, acknowledged that she had willingly executed the same, and that
99 she does not wish to retract it.

Given under my hand this 1st day of August, 1868.

M. H. STUMP, *N. P.*

WEST VIRGINIA:

WIRT COUNTY RECORDER'S OFFICE,
August 6th, 1868.

This deed from William Lynch & wife to James J. West, together with the certificate of acknowledgment hereto annexed, was this day received in said office, duly stamped, and admitted of record in deed book No. 10, page 310.

Teste:

C. B. FISHER, *Recorder W. C.*
Per LOCKHART, *Dept.*

The agreement referred to in the deposition of W'm Lynch, and marked Exhibit No. 2, is the same agreement attached to the deposition of said Lynch, taken on the part of the complainants, as is copied on page 77 of this transcript.

There was filed by the solicitors, for the parties herein, the following agreement in relation to that portion of the code of Virginia offered in evidence by the complainants.

Agreement relating to the code of Virginia, offered in evidence.

In the circuit court of the United States for the districts of Missouri.

KIMBAL ET AL.
vs.
WEST.

It is agreed that the title of the 117 chapter of the code of Virginia of 1849, & the tenth section thereof, need only be copied into
100 the transcript in this case as being the portions thereof having relevance to the issues herein.

GLOVER & SHEPLEY, *for Compl'ts.*
DRYDEN & LINDLEY, *for Def't.*

The tenth section of Chapter 117 of the code of Virginia, referred to in the foregoing agreement, is as follows, to wit:

Title, chapter, & section 10th of the code of Virginia.

CHAPTER CXVII.—*Forms of Deeds and of Covenants.*

* * * * * * *

§ 10. A covenant by the grantor in a deed, "that he will warrant generally the property hereby conveyed," shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of all persons whomsoever.

DEFENDANT'S EVIDENCE.

Deed of W'm Lynch to Jas J. West.

Deed of William Lynch to James J. West, dated August first, 1868, (is the same copied on page 97 of this transcript.)

Deposition of Mary Cline.

Deposition of Mary Cline, taken before Benjamin F. Stewart, a notary public within and for the county of Wirt and State of West Virginia, at Elizabeth, in said county and State, on the 25th & 26th days of March, A. D. 1869.

101 MARY CLINE, a witness of lawful age, being sworn and examined on the part of the defendant, deposeth and saith:

I am acquainted with James J. West, the defendant, and have known him for seven years. I am not acquainted with complainants. I am acquainted with a Mr. Elmore; have seen him at my house, and also at Mr. West'. Mr. Elmore is the person that bought Mr. West' land.

(The complainants objected, by their counsel, to the method of taking this deposition, and insist that it be taken by written interrogatories.)

About the first of January, 1865, at the defendant's house, in Wirt County, West Virginia, I heard a conversation between Mr. West, the defendant, and Mr. Elmore. I do not know particularly, but think it *is* R. P. Elmore. The conversation was about the sale of Mr. West's land. I suppose it was the same land mentioned in this suit. Mr. West was residing on that land at that time. He owned no other land in Wirt County at that time. Mr. West, the defendant, told Mr. Elmore that Mr. Lynch had an incumbrance on it. Mr. Elmore said it matters nothing. Mr. West showed Mr. Elmore his title-papers for the land. Mr. Elmore the papers, and was satisfyed with them. Mr. Elmore said he was a lawyer himself, and that Linche's title amounted to nothing, and he cained nothing for it. I do not recol'ect Mr. West saying anything about Mr. Linch having a suit pending against the land. On the 26th of March I heard another conversation between Mr. Elmore and Mr. West, the defendant, at defendant's house. The next day I don't think their was any writings enterented into; on this day might have been, but can't say; they wear writing and looking over papers, (Mr. Elmore and Mr. West.) I think the barg'in was closed on that
102 day, as Mr. Elmore did not come back any more. The first day Mr. Elmore came to Mr. West' house, Mr. West asked him twenty-five thousand dollars for his land that he owned, on which he resided, or for the whole tract. They did not agree on the price on the first day. Mr. Elmore offered him twenty thousand dollars, part in gold and part in greenbacks. Mr. West, the defendant, did not agree on that. Mr. Elmore then said that he would give him twenty-two thousand dollars. Mr. West, the defendant, did not give him an answer wheather he would take it or not on that day. Mr. Elmore then left that evening, and Mr. West that evening concluded that he would take the twenty-two thousand dollars. Mr. West concluded that he would go and see Mr. Elmore, and, in going, he met Mr. Elmore a short distance from Mr. West' house. Mr. West and Mr. Elmore both come to Mr. West' house. They then closed the barg'in at twenty-two thousand dollars. Mr. West told Mr. Elmore that Mr. Lynch had a suit in court against part of the land,

and that he, West, had gained the suit. I don't reccol'ect that he, West, said it had been put back into court. Mr. West left this State about the first of March, 1865, for Missouri, and did not leave secretl*e*y. Our families corresponded frequently. Mr. West left his wife at our house. About a week after he left Wirt County, she then left to meet him at Parkersburg, to go with him to Missouri. Mr. West was talking of going to Missouri when he left our house; that was the calculation, but did not know what part. In about two weeks after Mr. West and his wife left this State we got a letter, stating that he, West, had bought land and located in Missouri, near the town Kahoka, in Clark
103 County. His old neighbours inquired of us whe*a*r he had gon', and we told them. Mr. West never desired of us to keep it a secret, and we never thought of such a thing. Upon reflection, I believe Mr. West, the defendant, told Mr. Elmore that the*ir* was to be a rehearing of the suit with Mr. Linch. That conversation *a*ccur'ed on the second day that Mr. Elmore was at Mr. West' house.

Cross-examination by counse*l* for complainants:

I was sixty years old on the 9th of this month. Mr. West, the defendant, is my son-in-law; married my doughter about seven years ago. I lived at the time of the sale of this land about six miles from Mr. West. I was at Mr. West' house about three times before he left for Missouri. The two times I was the*ir* but two or three days at each time. The last time I was there near four weeks. The last time I was the*ir* was in January, 1865. I am certain that it was in 1865, from the fact it was the year that they moved to Missouri. I did not hear Mr. West say anything about Mr. Elmore before he, Elmore, came to the house at the time of the first conversation refer'ed to in my examination-in-chief. Mr. Elmore and another person came together to Mr. West', both the first and second time; the same person with Mr. Elmore both days. I did not learn the name of the person with Mr. Elmore. I heard all the conversation between Mr. West and Mr. Elmore, and the man with Mr. Elmore could have heard the conversation, for he was pres*a*nt all the time, and seemed to be interested in the conversation. Mr. Elmore seemed to be satisfied with the title-papers that Mr. West showed him. Mr. West gave him no assurance to the title of the land that I heard, but gave him his title-papers to examin' for himself. Mr. Elmore said the title-papers was all right. I cannot say that it was R. P.
104 Elmore. He said he was a lawyer. When Mr. Elmore asked Mr. West about the title of his land, he went and showed him his papers. Mr. West told Mr. Elmore that the*m* were his title papers to the land. Mr. Elmore did not say that the papers showed any incumberance on the land, but appeared perfect*f*u*l*y satesfied. This was on the last day that I saw him at Mr. West', and after examining the papers he ag*g*reed to pay Mr. West twenty-two thousand dollars for the land. The*ir* was no money paid down in my presence. I did not see any deed executed, and if the*ir* *w*as any papers drawn up I do not know what they contained. I have tried to recol'ect, but my mind is indistinct in regard to some matters in the transaction. I don't reccol'ect that the*ir* was anything said in regard to a title-bond. I don't reccol'ect that the*ir* was anything said about passing title to the land. . The*ir* was present, at both conversations refer'd to, Mr. West and wife, Mr. Elmore, and the gentleman that came with Mr. Elmore. These were all, except myself. I was present all the time during the conversation, but the*ir* might have been some of the conversation that I did not hear. I was assisting Mrs. West about the house while the*ir*, but I was not doing any work while

Mr. Elmore was their. I do not know that the house Mr. West was living in at the time was recovered by Mr. Linch, or that Mr. Linch recovered any land. I don't know, of my own personal knowledge, of any suit between Mr. Lynch and Mr. West, except what I heard Mr. West tell Mr. Elmore. I do not know, of my own knowledge, how mutch Mr. West received for the land. Mr. West was here, in Western Virginia, sometime last summer. I never knew of Mr. West giving pos-
105 session of the land, or of Mr. Elmore taking possession of it.

MARY CLINE.

Deposition of Geo. W. Cline.

Deposition of George W. Cline, taken before Benjamin F. Stewart, a notary public within and for the county of Wirt, and State of West Virginia, at Elizabeth, in said county and State, on the 26th day of March, 1869.

GEORGE W. CLINE, a witness of lawful age, being sworne and examined on the part of the defendant, deposeth and saith: I am sixty-five years old; I reside on Spring Creek in Wirt Co., West Virginia; am a farmer; I am not acquainted withe the complainants, but *am* acquainted withe the defendant for some fifteen years; I am acquainted with a Mr. Elmore; have seen him two or three times; I had a conversation with Mr. Elmore in regard to the purchase of the land mentioned in this suit of the defendant, Mr. West. This conversation *accoured* in the latter part of January, 1865, at my house; Mr. Elmore rode to my house one evening, and se'ing the old lady, my wife, he recognized her, concluded to stay all *k*night. After supper he——

(The complainants by their counsel object to the following because it has not been shown that the conversation took place with their agent, R. P. Elmore.)

Mr. Elmore told me he had bought the Jack West land; I asked him about the W'm Linch claime on the land; Mr. Elmore said Jack was very frank and told me all about it, and he caired nothing about it; I
106 understood he was acting for himself; this conversation *a*ccur'ed before the purchace-money was paid Mr. West. I ame some acquainted withe the land Mr. West sold Mr. Elmore; I can't say that I know how mutch land their was in the tract. By Jack West I mean the defendant; that is the name he goes by in this county; Mr. West left this State the latter part of March, 1865; I do not know what part he left for, but for the West; I thought he did not go secretley; it was the impression amongst his neighbours that he was going west; before he went Mr. West *rote* back to my famely that he had located in Kahoka, Clark County, Missoury; this was some time in May, 1865; Mr. West never desired of me to keep it a secret whear he had located; many of his acquaintences inquired of me about him, and I told them whear he had located; I should say that he went away from here openly and above board; I never saw any other Elmore in this county during the oil excitement, excepting the one above refer'ed to; from him I learned that his business in this county was buying oil-lands; I never saw or heard of Elmore untill he bought West' land; I have never seen or heard of him in this county since 1865.

Cross-examined by counsel for complainants:

The evening Mr. Elmore came to my house and stop'ed all *k*night their was another man with him; I do not know his name; did not here it mentioned; my wife, I suppose, might have heard the conversation

with Mr. Elmore; I did not see the purchace-money paid to Mr. West or the deed passed; don't know of my own knowledge when it
107 was paid or the deed given; Mr. West at the time the land was sold was living on it. This Mr. Elmore is the same man that was at Mr. West's when my wife was their; so she told me; I did not ask Mr. Elmore if he was buying for hymself or other parties. Mr. West is my son-in-law; married my daughter; Mr. Elmore did not mention anything about the nature of the claim; I never knew anything about the nature of the claim. (This Mr. Elmore that was at my house said he was a lawyer from New York.)

(The above answer included in parenthares objected to by defendant's counsel on account of it being heresay and not being a part of the conversation mentioned in chief.)

Mr. Elmore said that he had examined Mr. West' title-papers and found them all right—nothing wrong about them; he did not say anything about what kind of a deed Mr. West was to give him; Elmore did not say that Mr. West had told him the full nature of Mr. Lynches claime; I never saw Mr. Elmore but once after this conversation and then he was passing the road by my house.

GEO. W. CLINE.

Deposition of George E. Ball.

Deposition of George E. Ball, taken before Benjamin F. Stewart, a notary public within and for the county of Wirt, and State of West Virginia, at Elizabeth in said county and State, on the 31st day of March, A. D. 1869.

GEORGE E. BALL, a witness of lawful age, being sworne and examined on the part of the defendant, saith:

108 Question 1st, by defendant's counsel. Tell us wheather or not you are acquainted with the parties to this *writ*?

Ans. I know J. J. West.

Quest. 2d. State wheather or not you are acquainted with a certain tract of land situated in Wirt County, West Virginia, on the waters of the Little Kanawha River, formerly the property of J. J. West, and if so, who is now the owner of said tract, and wheather you know who is now in possession of the same.

Ans. I know whear the tract of land lies, and have been over the most of it, but don't know of my own personal knowledge *know* who is the owner of it; a Mr. Knight is now in possession of it.

Quest. 3rd. Do you know wheather or not this tract of land lies at the mouth of Rock Run, a tributary of the Little Kanawha River.

Ans. The land lies above and corners at the mouth of Rock Run.

Quest. 4th. State wheather or not you know how Mr. Knight got possession of this land.

Ans. I do. Some time about the 30th of March, 1868, a man representing hymself to be G. D. Smith came to my house in Burning Springs, Wirt County, haveing a paper purporting to be a power of attorney from G. D. S. Trask, who, in company with myself, went upon said land
109 and had a conversation with the then oc'upant, James Maze, and on the following day I gave said Maze a written notice to quit the premices and deliver them up to me, which notice is hereto attached & marked Exhibit "A," hereof, G. D. Smith having authorized me to serve said notice on Maze for him, the said Smith, he being present at the time.

(The complainants, by their counsel, object to the foregoing answer.)

Quest. 5th. Tell us, if you know, wheather or not James Maze gave up possession of said land in persuance of said notice, and if so when and to whome.

Ans. Said Maze told me at the time I served the notice that he would give me possession in a few days. He said he would give me possession then and would move out of the house in a few days, and he did so.

Quest. 6th. State wheather or not this man, G. D. Smith, authorized you at that time to take charge of, see to, and rent said land; and if so, how did he authorize you, in writin' or verbal'y, and for whome were you to rent it?

(The complainants by their counsel object to the foregoing question.)

Ans. The said G. D. Smith, at the time refer'ed to, did authorize me to take charge of, see to, and rent said land. He verbel'y authorised me so to do. I was to rent the land on behalf of Mr. Trask.

110 Quest. 7th. Will you now inform us wheather or not you subsequently rented said land; and if so, to whome, for what consideration, and for what length of time?

Ans. I rented the place last April to a Mr. Knight for a term of twelve months, in consideration of which he was to trim up the lower orchard, and pay all the taxes on said property for the year 1868. He was not to cut any timber on said land except for the purpos' of making railes.

Quest. 8th. State wheather or not you know what portion of said land was claimed at one time by W'm Lynch.

Ans. I do not know only by representation made by others.

Quest. 9th. Will you tell us wheather or not you have been over said tract of land, and if so wheather that portion of the same which lies farthest back from the Little Kanawha River, or that portion which lies along the bank of and nearest to said river, is the more valuable, estemated by the acre?

Ans. I have been over most of the land. I should say that that portion of land lying along said river is worth the most money per acre.

Quest. 10th. Will you tell us wheather or not you reside at or near the oil territory of West Virginia, and if so, wheather you have mutch

111 experience in, and knowledge of, the peculiar charictor and usual signes of oil territory?

(The foregoing questions wear objected to by complainants by their counsil.)

Ans. I reside at Burning Springs, in the oil territory. I can't say that I have mutch experiance in, and knowledge of, the peculiar charictor and usual signs of oil territory.

Quest. 11th. State how long you have been acquainted with J. J. West, the defendant in this cause, and wheather you know at what time he moved from said land, and out of the county of Wirt?

Ans. I have been acquainted with Mr. West from about the year 1841, or two. After that time their was from seven to ten years during which I did not see him. After that time I have known him to reside in Wirt County from the year 1852 to the spring of 1865, when he left and moved away.

Quest. 12th. State wheather or not you saw him at or near the time he moved away, and wheather or not he left secretly or openly and publickly.

Ans. I saw him frequently about the time he moved away, and think I saw him at the time he moved away, and it is my impression it was at the time. I think he left openly and publickly, as far as I saw. He represented that he wa' going to Missouri, and he was going to leave this country.

112 Cross-examined by counsel for complainants:

Quest. 1st. State whe*a*ther or not this tract of land you testified about on your examination-in-chief is the same tract from which this suit arose.

Ans. I suppose it is.

Quest. 2d. Do you know or not what part of this tract was recovered by one Lynch?

Ans. I do not.

Quest. 3rd. Are you, or not, very familie*r* with the whole tract, and have you been often on it?

Ans. I know the tract of land, and have been on it several times. The back upper part I have never been on.

Quest. 4th. Did you know or not of the defendant, West, living on the land?

Ans. I did know of his living on the land.

Ques. 5th. At what time?

Ans. I knew that he lived the*ir*' in 1849 till 1861, and I suppose he lived the*ir*' until he moved away from the county in 1865.

113 Quest. 6th. Did the man, G. D. Smith, mentioned in your examination-in chief, tell you or not of any recovery by one Lynch of a part of this tract?

Ans. He did not.

(The foregoing question and answer objected to by defendant by counsel.)

Quest. 8th. Have you the power of attorney spoken of by you as purporting to be from G. D. S. Trask?

Ans. I have not.

Quest. 9th. How full was said power of attorney; was it under seal or not; did it or not give the said Smith power to appoint agents to act for said Trask.

Ans. It was under seal, I think, and I think gave him power to appoint agents.

Quest. 10th. Did he or not inform you that any one was then claiming any portion of said tract against Trask.

Ans. He (Smith) told me that one Lomon told him that a party for whom*e* he (Loman) was acting as agent claimed a part of said tract; I think a small piece, not to exc*ede* two acres. I believe he said the name of the party *party* claiming the small piece of land refer'ed to

114 was Dihm. He said after he got here into this country he found several claiming this land. He said nobody had a title to the land but Trask.

Quest. 11th. State, if you know, which part of said tract of land is best timbered.

Ans. The part back from the river.

Quest. 12th. Did you or not ever look at this tract for the purpose of estimating the relative value of the def*f*endant's parts of it?

Ans. I have not, particular*l*y.

Quest. 13th. How far did West, the defendant, live from you at the time he moved from the State?

Ans. My residence was seventy-five miles from West, but I was then stopping at Burning Springs, which is about five miles from West.

Quest. 14th. Did he (West) inform you what part of Missouri he was going to?

Ans. I do not remember.

Quest. 15th. State, if you know, what month of the year 1865 West left the State.

Ans. I think in March or April.

115 Quest. 16th. Has Mr. Knight, to whome you gave possession of this tract, paid the taxes on the same and held possession of it?

Ans. I directed the sherriff to collect the taxes, but he told me afterwards that he had not, and I don't know wheather he has yet or not, and he holds possession of the premeces yet.

Quest. 17th. Dose he or not live on the tract?

Ans. He does not.

And further the deponent sayeth not.

GEORGE E. BALL.*

*Exhibit "A," referred to in the deposition of George E. Ball, is in the words and figures following, to wit:

Notice.

To JAMES MAZE.

SIR: For the purpose of determining your tenancy on the land known as the West place, in the county of Wirt & State of West Va., you are hereby notified to quit and deliver up to G. E. Ball the aforesaid land im'edemately.

Burning Springs, March 30th, '68.

G. D. SMITH,
For G. D. S. TRASK.

Deposition of George Monroe.

Deposition of George Monroe, taken before Benjamin F. Stewart, a notary public within and for the county of Wirt, and State of West Virginia, at Elizabeth, in said county and State, on the 1st day of April, A. D. 1869.

GEORGE MONROE, a witness of lawful age, being sworne and examined on the part ot the defendant, deposeth and saith:

Quest. 1st, by counsel for defendant. Are you acquainted with W'm H. Kimble an' D. G. S. Trask, complainant', and James J. West, defendant in this suit, or either of them?

Ans. I am acquainted with James J. West, the defendant, but not with the complainents.

116 Quest. 2d. State how long you have been acquainted James J. West, and where he resided, if you know.

Ans. I have known him since the fall of 1853. He lived about five miles above the Burning Springs, on the Little Kanawha River, in Wirt County, from that time till the spring of 1865, when he moved away.

Quest. 3rd. Did or did not Mr. West make a public sale of his personal property prior to his moving away in the spring of 1865; and, if so, were you at said sale, and did or did not Mr. West, at that time, an'ounce publeckly that he was about to leave this State?

(Objected to by counsil for complainants.)

Ans. I do not know that he advertised, but gave out word that he was going to have a sale. I was at the sale. It was generally understood, at that time, that he was going west to Missouri.

Quest. 4th. Are you acquainted or not with the tract of land on which Mr. West resided up to the spring of 1865? If so, state wheather or not that portion of said land which lies next to the Little Kanawha

River, or that portion which lies farthest from the same, is worth the most.

Ans. I am tolerably well acquainted with the land. I have been over most of it. That portion of said land lying next to the river is worth the most.

(The above answer is objected to by counsil for complainants.)

117 Quest. 5th. Do you or do you not know why R. G. Brown, esq., attorney for James J. West, abandoned said West' interest in a suit in ejectment pending in the circuit court of Wirt County, in the spring of 1866, wherein W'm Lynch was pla'ntiff and the said West, defendant, when the same was called up for trial?

(The complainants, by their counsel, object to the above question, because it could be shown by R. S. Brown, who resides in the State of West Virginia, and within thirty miles of the place of the taking this deposition, why he abandoned said West's interests, if he did abandon them.)

Ans. All I know about it is what Mr. Lynch told me. Mr. Linch, either in the fall of 1865 or the spring of 1866, told me that he went to R. S. Brown and told Brown that he wanted more counsel in the case. Brown told him that he was no longer West' lawyer, and that West had left, and he (Lynch) said that he gave said Brown a fee, and when the case came up for trial Brown stated to the court that he was no longer West' lawyer, and that he (Lynch) *had* ought to have the land.

Cross-examination by complainants' counsel:

Quest. 1st by complainants' counsil. State, if you know, where this R. S. Brown lives, and what his presant oc'upation is.

Ans. He lives near Ravenswood, in West Virginia. His presant oc'upation is judge of a circuit court of West Virginia.

118 Quest. 2d. What is your oc'upation?

Ans. I am a farmer.

Quest. 3rd. How near did you live to James J. West in the spring of 1865?

Ans. About three miles.

Quest. 4th. What time in the spr'g of 1865 did West leave the State?

Ans. He left some time the fore part of March.

Quest. 5th. Was it understood at the time of the sale refur'ed to in your examination-in-chief at what time West was to leave the State?

Ans. It was not understood when he was to leave, but it was understood that he was to leave soon.

Quest. 6th. Did you know the day he left for the West?

Ans. I did not.

Quest. 7th. Did you or not make enquiry after he had gon' where he had gon', and when he went?

119 Ans. I would not swear that he ever left the State, for I never saw him out of it.

Quest. 8th. After the sale of West's property in the spring of 1865, refer'ed to in your direct examination, did, or did not you see him?

Ans. The last time I saw Mr. West was when I paid him for the things I bought at the sale.

Quest. 9th. How long after the sale before you paid for the things you bought?

Ans. I do not recol'ect; I might have paid for them the next day, when I took the things.

Quest. 10th. Was the sale refer'ed to an auction sale?

Ans. It was not.

Quest. 11th. When West left the neighbourhood of Wirt County, did his wife le've with him?

Ans. I understood she did.

Quest. 12th. Did West sell his personal effects before or after the sale of his land?

Ans. The understanding I had of it was that he sold them after
120 he sold his land. The sale of them was between the first and the fifteenth of March, 1865.

Quest. 13th. Did or did not any one take possession of the prem*ecies* West left, soon after his leaving?

Ans. No one that I know of.

Quest. 14th. Are you or not acquainted with W'm Lynch, and do you know of his having a suit in ejectment against West to recover a portion of the tract of the land West lived on in the spring of 1865, and do you know the part recovered?

Ans. I am acquainted with him (Lynch) and know of him hav*e*ing a' ejectment suit to recover a part of this land, and know the portion he claimed and recovered.

Quest. 15th. State whe*a*ther or not a large bluff or ridge of rocks runs through that part of said tract not claimed or recovered by Lynch?

Ans. The*ir* is a considerable bluff of rocks around the river.

Quest. 16th. Is or is not this bluff of rocks on the part not claimed or recovered by Lynch?

Ans. The bluff on the river is not on the part claimed or recovered by Lynch.

121 Quest. 17th. Are you perfect*ul*ly familiar with this whole tract, & have you been often on it?

Ans. I cannot say that I am familiar with the whole tract; I have been backward and forward over a portion of it.

Quest. 18th. Is not the cleared part of that portion not claimed or recovered by Lynch m*u*ch ex'austed by long cultivation?

Ans. I should say it is pretty well ex'austed.

Quest. 19th. Are you acquainted with the locality of the house on this tract, and is it or not upp*o*n the part recovered by Lynch?

Ans. The house that West lived in is on the part Lynch told me he recovered. The*ir* is also a house on the other part, which is the only one fit to live in.

Quest. 20th. What is the condition of the house West lived in on the part of the land claimed and recovered by Lynch.

Ans. It is badly delap*i*dated, and the roof is off of it.

Quest. 21st. Whe*ar* we*ar* you when West left this county after the sa*il* of his personal property?

Ans. I was either at home or in Kentucky; I do not know which; I do not know when he left Wirt County; he was gon' when I came back from Kentucky.

122 Quest. 22d. Which is the best timbered portion of this whole tract; the part recovered by Lynch or the other part?

Ans. I should say the part recovered by Lynch is the best timbered part. And further the deponent sayeth not.

GEORGE MONROE.

Deposition of Ja's J. West.

Deposition of James J. West, taken before Benjamin F. Stewart, a notary public, within and for the county of Wirt, and State of West Virginia, at Elizabeth, on the second and third days of April, A. D. 1869.

JAMES J. WEST, the defendant, a witness of lawful age, being sworn and examined on the part of himself, deposeth and saith, viz:

By counsel for defendant:

Quest. 1st. State whether or not you are personally acquainted with W'm H. Kimble and Gustavus D. S. Trask, the plaintiff' in this cause, or either of them.

Ans. To the best of my knowledge I never saw either of them.

Quest. 2. State whether or not you were the owner and possessor of a certain tract of land situated in the county of Wirt and the State of West Virginia, on the waters of the Little Kan'wa River, at or near the mouth of Rock Run, on or about the first of January, 1865.

123 Ans. I was the owner of a tract of land so situated at that time.

Quest. 3rd. Did or did you not sell said tract of land; and if so, to whome?

Ans. I did sell said tract of land; I sold it to a man by the name of Elmore; a man calling himself Elmore came to my house, I think the fore part of January, 1865, asked me if my land was for sale; I told him I did not know whether it was or not; he asked me how many acres I had; I told him their was said to be four hundred acres in the survey; he asked me whear and how it laid; I gave him all the information I could whear the land laid and how; he then asked me how mutch I asked for it; I told him I had been holding it at twenty-five thousand dollars; he said he thought that was a pretty stif' price; he asked me if the title to the land was all right; I told him their was a man claiming a part of the survey for which he had entered suit; he asked me the charecter of this man's claime, and what title he was cla'ming under; I told him he was claiming under a tax-title; he then asked me what kind of a title I had; I told him I was claiming under a pattent; he then asked me to show him the pattent; I did so, and he examined it; he said it was a good title; I told him I did not know whether it was or not; supposed it was; he said he knew more about land titles than I did; he was a lawyer. He asked me what was the least money would buy the land; it was gitting late, and we must be going; their was

124 another man with him; I told him real'y the land was in no condition to sell, owing to this Lynch claim uppon it; he said he did not cair a dam' for the Lynch title, for their was not any of these tax-titles worth a cent; he then offered me twenty thousand dollars for the land; I told him I would not take it; they then got on their horses and started; after gitting fifty or seventy-five yard' from the house, the' stop'ed in the road, Elmore turned round and *road* back, offered me twenty-two thousand dollars; I told him if I sold the land, I must have twenty-five thousand dollars for it; he said he was going to remain at the wel's, (Burning Springs,) and in the neighborhood a day or two, and if I concluded to take that, I could let him know. Through the course of the evening or knight I did conclude to take the twenty-two thousand dollars. The next morning I started for Burning Springs, and met Mr. Elmore on the rive' road, about a half a mile from the lower end of the survey; I suppose it was between a mile and a half or two miles from

my house; he enquired the way to the Brooker farm; I gave him all the information he needed to find it. We then started, he up the river, and I down; we got a few paces apart; said he, "Halloe, West;" I stop'ed, and turned round in the road; he rode back to me; said he, are you a going to take twenty-two thousand dollars for your land? I told him I did not *cair* for a few thousand dollars in a trade of that size, and if it was not for the Lynch claim, I would take twenty-two thousand dollars for the land; he said I *nead* not be afraid of that; he *wodd* give me his word as a gentleman and a lawyer, that Lynche's
125 claim was worth nothing; I told him then I would take the twenty-two thousand dollars for the land; he asked me to ride back to the house with him, and go into writings. He drew up the writings which I found to be an option bond; I asked him what kind of a bond that was; he said it was called a' option bond; my best impression is that that bond run from twenty to thirty days; at the expiration of that time he was to pay me the money for the land, or else the article we went into was to be nul' and void.

Quest. 4th. State, if you know or not, what became of the writings you call an optional bond, and whe*a*ther or not Elmore and yourself signed it?

Ans. I do not know what became of the bond. I do not know whe*a*ther Elmore signed the bond or not. I, myself, and wife did sign it.

Quest. 5th. State whe*a*ther or not the writing you speak of was seal'd.

Ans. My best impression is that it was under seal.

Quest. 6th. Do, or do you not, know what Elmore's christ*e*n name was?

Ans. The man who made the contract with me, I afterwards learned, was Lyman Elmore; the name *and* in the writing was R. Palmer or R. P. Elmore.

Quest. 7th. State whe*a*ther or not Elmore paid you the twenty-
126 two thousand dollars, ac'ording to the terms of the agreement ref*u*r'ed to.

Ans. Elmore did not pay me the twenty two thousand dollars, ac'ording to the terms of the agreement ref*u*r'ed to. Lyman Elmore gave me a check on a bank in Parkersburg, with R. P. Elmore's name signed to it, about the last of February, 1865, for*e* one thousand dollars. About the first of March, 1865, R. P. Elmore paid me the bal*l*ance of the twenty-two thousand dollars. He paid me nineteen thousand four hundred, and, I think, thirty-eight-dollars by a draft on a New York bank, and the remainder in greenbacks.

Quest. 8th. Did you, or did you not, make and execute a deed for said tract of land; and if so, to whom and when?

Ans. I made a deed to R. P. Elmore for the whole of the tract of land on the 31st day of January, 1865, and my wife and I signed it.

Quest. 9th. State, if you recol'ect, to whom*e* you delivered said deed.

Ans. I delivered said deed to R. P. Elmore.

Quest. 10th. State whe*a*ther or not the said R. P. Elmore made any objections to the title of said land either at the time of the delivery of the deed by you to him or at the time he paid you the purchase-money.

Ans. He did not make any objections to the title of said land.
127 either at the time of the delivery of the deed or the payment of the purchase-money.

Quest. 11th. Were you, or not, in possession of the said tract of land at the time you delivered the deed to Elmore?

Ans. I had sold my personal property and moved off the land before

I delivered the deed from three to four days. I considered I had control of the land until I delivered the deed and got the money.

Quest. 12th. Had, or had you not, any conversation with R. Palmer Elmore in relation to the title of the land or to Lynche's claim on the same prior to the making and execution of the deed by you to him; and if so, when and what?

Ans. I had a conversation with R. P. Elmore in relation to the titles of said land about the middle of January, 1865. It was at Parkersburg. I told him that I had *gave* a title-bond to a man I supposed to be R. P. Elmore; but I had since as'certained that it was Lyman Elmore that I had don' the writings with, and that he, the man with whom I was talking, was R. P. Elmore. He told me that was his name. I told him that I wanted to acquaint him with the situation of the title of the land I had given a bond for to him or Lyman. He said, what about it? I told him there was a man by the name of Lynch claiming a part of the land under a tax-title. He asked me if he was the man that had instituted a suit for the land. I told him he was. He said he understood all
128 about that, and that that claim would never bother me any. I then told him I did not know how it might turn out, and that Lynch only asked sixteen hundred dollars for his claim, and I thought I had better buy it; that it might save further dif'iculty; he said it was just throwing away sixteen hundred dollars, and if he was in my place he would not pay him a cent.

Quest. 13th. State whether or not the conversation had by you with R. P. Elmore at Parkersburg was before he paid you the purchace-money and before you delivered him the deed for the land.

Ans. That conversation had with R. P. Elmore at Parkersburg was before he paid me the purchace-money and before I delivered him the deed for that land; it was also before the time had expired in the option bond.

Quest. 14th. State whether or not at any conversation you had with Lyman Elmore and R. P. Elmore, or either of them, you represented your title to said land to be perfect and free from all encumbrance.

Ans. I never made any such representation to them or either of them.

Quest. 15th. Did you, or did you not, at any time, either upon the payment of the purchace-money by Elmore to you or when you
129 delivered the deed, agree with him that you would remain in possession of said land, and keep possession of the same for him until he should be ready to receive it from you?

Ans. I never agreed to hold possession of the land a minut' after I got the money; it was fully understood by E'more that I was going to Missouri as soon as I got the money and delivered the deed.

Quest. 16th. Had or had you not at any time any conversation with R. P. Elmore, in relation to you' leaving this State; if so, when, and what was it?

Ans. I had a conversation with R. P. Elmore between the middle and last of February, 1865. This conversation to' place in Parkersburg. I went to see R. P. Elmore to know whether he intended to pay me the money for that land or not. He said he did. I told him the bond was forfeited, and he had the thing all his own way now, and if he intended to take the land I wanted to know it; that I had been making *any araingments* to move to Missouri, and I did not want to be disap'ointed. He told me *their* should be no disap'ointment; that he would be up at the wells the fore part of the next week and pay me the money. He did not come to the wells at that time, but shortley after Lyman Elmore came *their*; said they did not like to carry money up in that country,

but for me to come to Parkersburg any time after the first of March, and they would pay me the money.

Quest. 17th. State, if you reccol'ect at what time you started from this State for the State of Missouri.

130 Ans. I left Parkersburg for the State of Missouri on the 27th day of March, 1865.

Quest. 18th. State, if you recol'ect, at what time you moved off said tract of land.

Ans. I do not recol'ect the day of the month, but think it was some time between the first and fifth of March, 1865.

Quest. 19th. Was it or was it not generally known by your neighbors at or about the time you moved off the land that you *wear* going to the State of Missouri?

Ans. I told a good many of my neighbors that I was going to Missouri as soon as I got the money for my l*i*nd.

Quest. 20th. State, if you recol'ect, about when it was that Lynch instituted a suit in ejectment against you in the circuit court of Wirt County for the recovery of the land.

Ans. I think it was in 1860 that Lynch instituted his suit against me.

Quest. 21st. State wh*e*ather or not R. S. Brown, esq., was employed by you as attorney to defend your int'rest in the ejectment suit Lynch brought against you; wh*e*ather you paid him a fee, and wh*e*ather you rel*y*ed upon him solely as your attorney in the case.

Ans. I employed R. S. Brown, esq., to attend to that case for me, and paid him a fee. I rel*y*ed on him sole'y as my couns*i*l.

131 Quest. 22d. State wh*e*ather or not you *wear* present at the trial of the same in April, 1866, and if not, *whear* you *wear*, and why you did not attend that term of the court.

Ans. I was not present at the trial in April, 1866. I was in Missouri at that time. I saw R. S. Brown, esq., a short time before I left. I asked him if it would be nessessary for me to attend the court her' till that case was disposed of. He said it would not be nessessary; that I could do no good if I was here. I asked him if I could fully rely on him to attend to it for me. He said he would attend to it for me, and *nock* it back to Gilmore, *whear* it belonged. I told him I would leave the case with him; shook hands with him, and left for Missouri.

Quest. 23rd. State, if you recol'ect, where it was that you first learned that the suit of Lynch against yourself in the circuit court of Wirt County had been determined.

Ans. I think it was the 22d or 23rd day of July, 1868, when the sher*r*iff served the notice of this suit, in which this deposition is being taken, on me that I first learned Lynch*e*'s suit had been determined.

Quest. 24th. Did or did not Lynch at any time after the determination of his said suit take possession of any portion of the tract of land you sold to Elmore, or did any one take possession for him?

Ans. I do not know that Lynch took possession of said land, and do not know that any one did for him.

132 Quest. 25th. State, if you know, who is now in possession of the land.

Don't know; but understood that a young man by the name of Knight.

Quest. 26th. State wh*e*ather or not *their* was at any time after you sold the land to Elmore any ag*g*reement or understanding between you and Mr. Lynch to the effect that you should move off said land, and that he should enter on and take possession of the same.

Ans. *Their* neaver was any such aggreement or arraingement gon' into or thought of by me with Lynch or any one els'.

Quest. 27th. At what place and time did Elmore pay you the nineteen thousand four hundred and thirty-eight dollars?

Ans. The place was in Parkersburg, in one of the banks; I do not reccol'ect which one. The time was some time the first of March, 1865.

Quest. 28th. State, if you know, wheather or not Elmore obtained the draft on New York at one of the Parkersburg banks.

Ans. He did obtain the draft refur'ed to at one of the Parkersburg banks. I was with him at the time.

Cross-examination by counsil for complainants.

By complainants' counsil:

Quest. 1st. When Elmore came to your house the fore part of January, 1865, and asked you if your land was for sale, how many acres
133 *their* was of it, and *whear* and how it lay, had you or not ever seen him about *their* before; did you or not take him out and show him the boundaries of the land; did you show how much Lynch claimed of said land, and what part his *clame* covered; did you or not tell him when Lynche's suit was instituted; or what did you till him about it; when he asked you the character of Lynche's title did you explain in full its character?

Ans. When Elmore came to my house in the fore part of January, 1865, and asked if my land was for sale, and how many acres their were, and whear and how *how* it lai', I had never seen him about their before that I know of. I did not take him out and showd him the boundaries of the land; I showed him the river part of the land, which was all that he wanted to see. I did not show him how much Lynch claimed of said land, and what part his claimed covered. I do not recol'ect wheather I told him when Lynche's suit was instituted. I told him it was a suit to eject me off the land.

Quest. 2nd. Did you or not tell Elmore that you had had other offers for the land?

Ans. Not that I reccol'ect of.

Quest. 3rd. Are you or not posative that you did not tell him of others offer' you had had for said land?

Ans. I am not posative; my best recollection is I did not.

Quest. 4th. Did you or not consider Lynche's cla'me a good one?
134 Ans. I did not consider it worth anything.

Quest. 5th. Why, then, did you abandon it, and stay away a year or more, till Lynch got judgment on the trial?

Ans. I did not abandon the suit. I employed an attorney, R. S. Brown. He promised to attend to it, and defended it for me and paid him therefor.

Quest. 6th. Is or is not the said R. S. Brown reputed to be a very responsible man pecuniar'ly, and have you or not instituted suit against him for damages?

(Question objected to by counsel for defendant.)

Ans. I understand that R. S. Brown, esq., is in very good circumstances, pecunear'ly. I have instituted no suit against R. S. Brown for damages.

Quest. 7th. Was it the difference between twenty-five thousand and twenty-two thausand dollars or the Lynch cla'me that kept you from excepting Elmore's offer the first day or days that it was——

Ans. It was both together.

Quest. 8th. What led you then to accept it the second day?

Ans. The further assurance of Elmore that Lynche's cla'me was worth nothing, and I considered the twenty-two thousand dollars was worth more to me than the land.

Quest. 9th. Did or did you not the next morning, when you
135 say you started for Burning Springs, do so for the purpos' of seeing Elmore and telling him you accepted his offer of twenty-two thousand dollars for the land?

Ans. Yes. I started for the purpos' of seeing him for a further conversation with him. I met him in the ro'de. He made some enquir'es about other matters. I did not say anything to him about our trade. He started up the river and I down. We got a short distance apart; he then called to me and asked if I was going to let him have the land. I told him if it was not for the Lynch claime on it I would take twenty-two thousand dollars for it. He said I ne*a*d not have any fears of *about* that.

Quest. 10th. If you started to see him about accepting the offer of twenty-two thousand dollars, why did you allow him to start to leave without saying anything about it to him?

Ans. I did not want to be to' keen.

Quest. 11th. After you had concluded to accept the twenty-two thousand dollars why did you tell Elmore you would take it if it was not for the Lynch claim?

Ans. I intended to see him, and if he regarded the Lynch claime as he did the evening before, and still in the notion of giving me the twenty-two thousand dollars I was a going to take it.

Quest. 12th. If you really me'nt what you said to Elmore, that you did not care for a few thousand dollars in a trade of that kind, and was so con'ciensious about the Lynch claim, why did you not buy up the Lynch claim for the sixteen hundred dollars?

136 Ans. My lawyer told me he had every confidence he could beat Lynch in the suit, and I thought it was no use to pay sixteen hundred dollars to Lynch.

Quest. 13th. Could you or not have sold this land to any one else for as much or more than Elmore gave.

Ans. I do not know. He offered me more than any one else had before.

Quest. 14th. Did he or not say the land was being bought to be sold again?

Ans. No; not to my recol'ection. He said he was going to bo*a*re an oil well or two on it.

Quest. 15th. Whe*a*r' was the deed delivered to Elmore?

Ans. I delivered the deed to Elmore at Parkersburg, the day he paid me the money.

Quest. 16th. Do you or not remember at what place in Parkersburg?

Ans. I do not remember.

Quest. 17th. Do you or not remember who was present?

Ans. I do not.

Quest. 18th. Did R. S. Brown ever write you about the Lynch suit after you went to Missouri?

Ans. He did not.

Quest. 19th. Do you or not know that Lynch did not, or any one for him did not, take possession of said land after his recovery?

Ans. I do not know personally that he did not take possession, or that any other person did not take possession of said land for him.

137 And further deponent sayeth not.

JAMES J. WEST.

Deposition of Lemuel Haverty.

Deposition of Lemuel Haverty, taken before W'm W. Thomason, a notary public within and for the county of Wirt, and State of West Virginia, at Elizabeth, in said county and State, on the seventh day of January, A. D. 1870.

LEMUEL HAVERTY, a witness of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

1st question. State your age and residence.

Answer. Thirty-nine years of age, and my residence in Calhoun County, State of West Virginia.

2d question. Where did you reside in the years 1864 and 1865?

Answer. In Burning Springs Township, Wirt County.

3rd question. State whether you held any office in the year 1864 or 1865; and if so, what it was.

Answer. Justice of the peace of Burning Springs Township, in the years 1864 and 1865.

4th question. Are you acquainted with the parties to this suit?

Answer. Am acquainted with Mr. West, the defendant in this suit, but not with the complainants.

5th question. Are you acquainted with the tract of land in controversy in this suit, which the defendant sold to the plaintiffs or their agent, Mr. Elmore.

Answer. I am; have been acquainted with the land some
138 fifteen or eighteen years.

6th question. What was that land worth previous to the oil excitement in this country, and what is it worth since that excitement subsided?

Answer. From one dollar to one dollar and a half per acre.

7th question. State if you know about what time Mr. West sold the land.

Answer. Am not quite certain, but think in November or December 1864.

8th question. How long after he sold it, did he make the deed?

Answer. He made the deed some time in the early part of 1865.

(The 8th question objected to by complainants' counsel.)

9th question. Was the sale and deed made during the oil excitement in this country?

Answer. It was.

(The 9th question objected to by complainants' counsel.)

10th question. State about what time the oil excitement commenced and subsided in this county.

Answer. Commenced about the first of June, 1864, and went down about May, 1865.

11th question. State whether or not that land was considered valuable during that oil excitement.

Answer. It was considered valuable during that time, because it lay
near Burning Springs, and in what was termed "the belt," and
139 any territory lying near there was considered very high during those times.

12th question. State whether or not you are acquainted with that portion of the said tract recovered by W'm Lynch and its relative value between it and the other portion of the land.

Answer. I do not know the exact lines of that land. Lynch recovered

off the upper end of the tract, and I do not think its value any more than the other.

13th question. Which end of the tract is the largest amount of improvement on.

Answer. On the lower end of the tract lying on the river.

14th question. Did any portion of the tract recovered by Lynch extend to the river?

Answer. I think not.

15th question. State which portion of the land was considered most valuable for oil purposes during the excitement.

Answer. The lower end of the tract and lying on the river.

16th question. How many houses were on the tract of land—dwelling-houses, I mean, at the time it was sold?

Answer. No house on the tract; believe there was a cabin on it.

17th question. State whe*a*ther or not you heard a conversation between the defendant and one of the Elmores, at Burning Springs, about the first of January, 1865, in relation to the sale of the land.

Answer. I did.

140 18th question. State whe*a*ther in that conversation, the defendant, Mr. West, said anything to Elmore about Lynch's claim on the land; and if so, state what he said, and Elmore's reply.

(The 18th question was objected to by complainants' counsel, unless the whole conversation at that time is given.)

Answer. I heard Mr. West say to Mr. Elmore that he had sold him land that older claims would take. Mr. Elmore said then that he had examined, and did not care for Mr. Lynch's title or claim.

(Answer to the 18th question objected to by the complainants' counsel on the grounds that the said conversation took place after the sale of the said land.)

19th question. Is that all the conversation you heard between Mr. West and Mr. Elmore at that time?

Answer. This is all I heard at that time.

20th question. Was this conversation before or after Mr. West had sold the land and made the deed?

Answer. It was after he sold the land; the deed had not been made yet.

(The answer to the 20th question was objected to by complainants' counsel, on the ground it was altered by suggestion of defendant's counsel.)

21st question. State what was the business of Elmore, the party referred to in your deposition.

Answer. The buying and selling of oil lands.

22d . State about the time he came to this country, and the time *has* left, to the best of your knowledge.

141 Answer. The first time I saw him was about the latter part of 1864, and the last I saw him was in 1865.

23rd question. Was he a resident of this county and State?

Answer. I do not know.

24th question. State whe*a*ther or not you understood from the conversation between Mr. West and Elmore, before referred to, that West had sold Elmore his land; and if so, for how much?

(24th question objected to by complainants' counsel.)

Answer. I understood from them Elmore had bought the land from West, and was to give him twenty-two thousand dollars.

Cross-examination of Lemuel Haverty, the witness, by complainants' counsel:

1st question. In answer to the eleventh question you state that the land was considered valuable, because it lay near Burning Springs and in what was termed the "Belt;" will you now state how far the said tract lays from Burning Springs?

Answer. From the lower end of the tract I believe it is about two and a half miles.

2d question. How much of the said land was recovered by William Lynch?

Answer. I do not know.

3rd question. Did William Lynch recover from the upper or lower end of the tract?

Answer. From the upper end.

4th question. How do you know what portion of the said land Mr. Lynch recovered?

Answer. Mr. West showed me.

142 5th question. When did Mr. West show you?

In 1864 and 1865.

6th question. Has your whole knowledge of the portion of said land that Mr. Lynch recovered been gained from Mr. West?

Answer. Yes; principally. Have heard a good deal of other talk about it, but only hearsay.

7th question. Do you know, of your own knowledge, that that portion of the said land recovered by William Lynch does not extend to the river?

Answer. I do not.

8th question. In answer to the 15th question you state that the lower end of the tract was considered most valuable for oil purposes; state how you gained this information.

Answer. I gained it from oil men in the business, engaged in boring oil wells, and because it was nearest to Burning Springs, where they obtained oil.

9th question. Do you know, of your own knowledge, that the lower end of the said tract was the most valuable for any purposes?

Answer. It was the best farming lands, and it was considered best for oil, because it lay on the river.

10th question. Are there no tracts of land lying between Burning Springs and the tract in controversy upon which oil has never been found?

Answer. There are.

11th question. Have you ever been over the whole of the tract

143 of land sold by West to Kimball & Trask?

Answer. I have not.

12th question. Have you ever been over the portion recovered by Lynch?

Answer. Have been over part of it.

13th question. How much of it have you been over?

Answer. Was on it looking for timber, for stave purposes; suppose was over fifty or seventy-five acres.

14th question. How do you know you were on the portion of land recovered by Lynch from West?

Answer. I was on the side Mr. West showed me, and also Mr. Bailey Knight, who was agent for Mr. Lynch—who represented himself as such.

Further deponent saith not.

LEMUEL HAVERTY.

Deposition of Zachuel Morgan Knight.

Deposition of Zachuel Morgan Knight, taken before W'm W. Thomason, a notary public within and for the county of Wirt and State of West Virginia, at Elizabeth, in said county and State, on the tenth day of January, A. D. 1870.

ZACHUEL MORGAN KNIGHT, a witness of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

1st question. State your age, residence, and occupation.

Answer. My age is twenty-one years; my residence on Rock Run, on the Bailey Knight farm, in the county of Wirt, and State of West Virginia; and my occupation, farmer.

144 2d question. How far do you live from the land in controversey in this suit—the West farm?

Answer. The farm I live on joines the West farm.

3rd question. State who occupied and used the land in controversey in this suit in the year 1866, 1867, and 1868?

Answer. I farmed the land myself in' 1866; James Maze in 1867. I rented the farm in 1868, and relet it to Caleb Tribbett.

4th question. Who did you rent the farm from in 1868?

Answer. Of Mr. George Ball.

5th question. State wheather or not William Lynch ever had possession of any part of the said land since the 3rd of April, 1866?

(Question objected to by complainants' counsel as improper.)

Answer. No; not that I know of.

6th question. State, if you know, what portion of the said land was recovered by William Lynch?

Answer. The back part of the tract lying back from the river.

7th question. State wheather the portion claimed and recovered by Lynch is of more or of less value than the other portion for farming or oil purposes.

Answer. I think the portion recovered by Lynch is of less value for either purpose.

8th question. State wheather or not the Lynch portion was necessary for the full enjoyment of the other portion, or remainder of the tract.

Answer. There was enough for a man to live on without the Lynch portion.

145 (Question and answer objected to by complainants' counsel as improper.)

9th question. Describe the improvements on the part recovered by Lynch, if any, at the time West sold.

Answer. There was about three or four acres only improved on the part recovered by Lynch, and a kind of temporary cabin for a man to live in, and about twenty-five or thirty apple trees.

10th question. Describe the cabin by giving its size and value.

Answer. I do not know its size—pretty well rotted down; I am not certain about the rooms, but think there were two. Didn't think it was worth anything; it would have been worth nothing to me.

11th question. How much do you think the cabin was worth to the farm, if anything?

(Question objected to by complainants' counsel as improper, because it is what the witness thinks, not what he knows.)

Answer. I do not think it was worth hardly anything, as a man could not live in its more than three or four years without its falling down on him.

12th question. Is the cabin standing yet?

Answer. Part of it is standing there yet.

13th question. Describe the improvements on the other portion of the tract at the time West sold.

Answer. There was about twenty or twenty-five acres improved on the other part of the tract, and about two hundred and fifty bearing apple trees; the twenty-five or thirty acres was all under fence.

146 14th question. Do you know how the value of the portion of land recovered by Lynch compares with the balance of the tract? If so, state it.

Answer. I shouldn't suppose it was worth quite as much, because there is no improved land on that of any notice.

15th question. State what the value of the whole tract was, before and after the oil excitement of 1864 and 1865, per acre.

Answer. About two and a half dollars per acre, I should think.

16th question. What would it have rated at during the oil excitement?

Answer. From twenty-five to fifty dollars per acre.

17th question. State wheather lands lying on the river or those lying back from the river commanded the highest price during the excitement for oil lands.

Answer. That lying on the river.

18th question. State wheather or not you are acquainted with Lyman and R. P. Elmore; and if so, how and under what circumstances you became acquainted with them, and at what time.

Answer. I cannot say I am acquainted with them; have seen them both, because they contracted to buy my father's farm in the fall of 1864 or the spring of 1865.

19th question. Where did you see them?

Answer. I saw one of them at Burning Springs; the other I saw at Parkersburg.

147 20th question. State wheather or not they paid your father for his farm?

(Question objected to by complainants' counsel as improper and irrelevant.)

Answer. They did not.

21st question. State the business of the Elmores in *his* county; when they came here, and at what time they left.

Answer. All I know of them was the buying and selling of oil lands. The first I heard of them was in the fall of 1864, and the last I heard of them was in the spring of 1865.

22d question. State when and where you last saw them.

Answer. The last I saw of them was in Parkersburg, in March, 1865. Then I went on to Kentucky; came back in May. I enquired for them and could not learn anything of them.

23rd question. State wheather George Ball rented you the place, for 1868, for himself or as agent for other parties.

Answer. As agent for other parties.

(Question and answer objected to by complainants' counsel, on the grounds of being *to* general and improper.)

24th question. State wheather or not Mr. Ball represented himself as agent of the parties to whom West sold his land.

Answer. He did.

25th question. State wheather or not William Lynch ever demanded possession of any part of the said land, or demanded rent from you while you were in possession of it.

148 Answer. Never demanded possession or rent of me.

(Question and answer objected to by complainants' counsel, on the grounds that the witness never rented the land until after the sale of the land by West to Kimball & Trask.)

Cross-examination:

1st question. State your age, residence, and occupation at the time West sold the land in controversey to Kimball & Trask.

Answer. My age was seventeen years, I think; my residence on the Bailey Knight farm, lying on Rock Run, in the county of Wirt and State of West Virginia, & my occupation farming.

2d question. From whom did you rent the land in controversey in the year 1866?

Answer. I did not rent it from anybody; I tended the ground, but did not rent it from anybody.

3rd question. To whom did you pay rent for the land in controversey in 1866?

Answer. Did not pay anybody.

4th question. From whom did James Maze rent the farm in 1867?

Answer. He said he rented it from Kimball.

5th question. State, if you know, to whom James Maze paid the rent in 1867.

Answer. He said he was to improve the place for the rent of it.

149 6th question. Did James Maze improve the place during the year 1867; and if so, in what manner?

Answer. He put a house upon it.

7th question. In answer to question 6, examination in chief, you state Lynch recovered the back part of the tract, lying back from the river. How did you gain your information?

Answer. I heard Lynch say so.

8th question. Was all your knowledge as to what portion of the said land William Lynch recovered gained from him?

Answer. I have heard him say so, and heard several others say so.

9th question. Do you know, of your own knowledge, outside of what Lynch and others told you, what portion of the said land William Lynch recovered?

Answer. I do.

10th question. How do you know what portion of that said tract William Lynch recovered?

Answer. Because I saw it surveyed off.

11th question. When did you see it surveyed, and who surveyed it?

Answer. Cannot tell the exact time; was, I think, in 1858 or 1859. It was surveyed by a man by name of Cox.

12th question. How old were you at that time?

Answer. About eleven years old.

13th question. Did you assist in surveying this land?

Answer. I do not know whether I assisted any. I was along.

14th question. How do you know they were running the lines of that portion of the land claimed and recovered by Lynch?

150 Answer. Because my father bought a piece of Lynch, & had to run off the whole survey before he could run off the piece bought by my father.

15th question. How do you know that the land surveyed by Cox was the same land claimed and recovered by Lynch from West?

Answer. Because it is in the same survey as that my father bought.

16th question. How do you know all the lines of this survey were run by Cox?

Answer. Because I was with him when he ran nearly all the lines.

17th question. In answer to question seven, examination in chief, you state the portion recovered by Lynch is of less value for either farming or oil purposes than the other. Are you well enough acquainted with surface indications to testify as to what is or is not oil territory?

(Question objected to by defendant's counsel as improper.)

Answer. I am not.

18th question. Did you ever engage in the buying and selling of oil territory; if so, when and where?

Answer. I never did engage in that business.

19th question. How many acres of the said tract of land was recovered by Lynch?

Answer. I do not know how many.

20th question. In answer to question seventeen, examination in
151 chief, you stated that land lying on the river commanded the highest price as oil lands. From whom and in what manner did you gain your information?

Answer. From men engaged in the business of buying and selling oil land.

21st question. Which one of the Elmores contracted to buy your father's land?

Answer. Lyman Elmore.

22d question. When and where was the contract entered into?

Answer. As well as I can recollect, it was at Burning Springs, either in the fall of 1864 or the spring of 1865.

23rd question. Was you present at the time the contract was entered into?

Answer. No; I was not present at the time the contract was made.

24th question. How do you know the contract mentioned in your answer to question eighteen, examination in chief, was entered into by your father and Lyman Elmore?

Answer. Because my father said so, and that he was offered eight thousand dollars for his farm, and could not accept it because Elmore had his bond.

25th question. Was the contract you mention as having been entered into by Elmore and your father a written contract, or a verbal one, to the best of your knowledge?

152 Answer. To the best of my knowledge, it was a written contract.

26th question. Did you ever see the said contract?

Answer. No; I have not seen it.

27th question. Do you know, of your own knowledge and outside of information gained from others, that the business of the Elmores was the buying and selling of oil lands?

Answer. I do not, of my own knowledge.

28th question. Which one of the Elmores did you see at Burning Springs, and which one did you see at Parkersburg?

Answer. Saw Lyman Elmore at Burning Springs, and R. P. Elmore at Parkersburg.

29th question. How did you become acquainted with R. P. Elmore?

Answer. I do not consider I ever was acquainted with him.

30th question. How did you know the man you saw in Parkersburg was R. P. Elmore?

Answer. Because he told my father, in my presence, his name was R. P. Elmore.

31st question. Will you state the value and quantity of timber on that portion of the said tract of land recovered by Lynch of West?

Answer. It would not be worth much of anything to me. I do not know about the quantity; there is a good deal of timber on it.

32d question. Is or is not that portion of the land recovered
153 by Lynch as well timbered as the remainder?

Answer. I think it is as well timbered as the other.

Further this deponent saith not.

Z. M. KNIGHT.

Deposition of Ixaiah Lowman.

Deposition of Ixaiah Lowman, taken before W'm W. Thomason, a notary public within and for the county of Wirt, and State of West Virginia, at Burning Springs, in said county and State, on the 10th day of January, A. D. 1870.

IXAIAH LOWMAN, a witness of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

1st question. State your age, residence, and occupation.

Answer. Forty years of age; residence, Burning Springs, in the county of Wirt and State of West Virginia, and my occupation, merchant.

2d question. State how long you have resided at Burning Springs.

Ans. Nine years.

3rd question. State at what time the land or oil excitement commenced, and when it subsided; I mean of 1864 and 1865.

Answer. I do not know when it commenced, but it ended, as far as I know, about the latter end of March, 1865.

4th question. State whe*a*ther or not lands lying within a few
154 miles of Burning Springs sold for large prices during the excitement, in consequence of the prospect for oil in that neighborhood.

Answer. They sold at very high prices; I should call it so.

5th question. State whe*a*ther or not they did not sell for eight or ten times their real value for farming purposes, or eight or times the amount they would have brought before or *said.*

Answer. I think six times as much, as least.

6th question. State whe*a*ther or not you were acquainted with Lyman and R. P. Elmore and W'm H. Kimball, and what time they came to this country, when they left, and what business they were engaged in while here.

Answer. I was not well acquainted with any of them. I saw Lyman Elmore in March, 1865, on Spring Creek, Wirt County; I knew nothing of the others; saw Kimball, I suppose, once. The time mentioned that I saw Lyman Elmore was the first time I had seen him, and the last time I saw him was in April, 1865. Lyman Elmore was in the land speculation business, I believe.

7th question. What business was you engaged in during the land excitement of 1864 and 1865?

Answer. I was engaged slightly in the land speculation myself; was in the mercantile business at the same time.

8th question. State whe*a*ther or not W'm H. Kimball and R. P. Elmore were well known in this county during that time.

Answer. I think *the* were well known.

155 9th question. Did they reside here?

Answer. I think not, only temporarily.

10th question. In what part of the county were they well known, and by whom?

Answer. In Burning Springs, by George Wilson, William Lagrange, and I don't know who else.

Cross-examination:

1st question. Do you know, of your own knowledge, that Lyman Elmore, R. P. Elmore, and William H. Kimball were engaged in land speculations during the excitement of 1864 and 1865, and that they bought lands for the purpose of speculating in them?

Answer. I knew one of the Elmores was, and nothing of the others.

2d question. Which one of the Elmores was engaged in land speculation?

Answer. Lyman Elmore.

And further this deponent saith not.

I. LOMAN.

Deposition of Harrison Cain.

Deposition of Harrison Cain, taken before M. H. Stump, a notary public within and for the county of Gilmer, and State of West Virginia, at Glenville, in said county and State, on the 23rd day of March, A. D. 1869.

HARRISON CAIN, of lawful age, being sworn and examined on the part of the defendant, deposes and sayeth:

156 Question 1st, by defendant. Were you present when the deed from Lynch to West was executed; if so, what was your understanding about the disposition of the deed?

Answer. I was present on the day that this deed was executed and the article of agreement entered into, and after that it had been agreed by the parties that the deed was to be left in my hands. Mr. Lynch remarked to Mr. West that it would be better that West would have the deed placed upon record. West remarked that he had purposed doing so, or that it would be best, or something to that effect. West then said, inasmuch as the deed was left in my hands, that he supposed that it would be necessary for me to go to Elizabeth with him, in order to have the deed recorded, and continue the original in my possession. A short time after this conversation in the office, Mr. Lynch and myself walked out together, when I stated to Mr. Lynch the request of West, that I should go to Elizebeth with him and carry this deed for the purposes before stated. I told Mr. Lynch that my health at that time would not admit of my making the trip, but stated to Mr. Lynch that if he intended to permit the deed to be placed upon record, that I would allow my brother to carry it to Elizebeth for record, to which proposition I understood Mr. Lynch to consent. I afterwards gave it to my brother, and within a short time—say three or four weeks—it was returned to me. After the deed was returned by my brother to

157 me, I kept it until yesterday, when I delivered it to defendant West.

(*To* the foregoing question and answer, objected to by complainants.)

Cross-examined by complainants:

Question by same. Did this conversation with Mr. Lynch occur before or after the writt*i*n article of agreement which has been made a part of the testimony of Mr. Lynch *were* executed?

Answer. My recollection is that this conversation took place before either the deed or the article of agreement was made, but on the same day.

Question 3rd by same. Are you a relative of Mr. West; if so, how near?

Answer. I am a brother-in-law.

And further this deponent sayeth not.

HARRISON CAIN.

158 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of William H. Kimball and Gustavus D. S. Trask, complainants, against James J. West, defendant, in chancery, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this fourteenth day of December, in the year of our Lord eighteen hundred and seventy.

[SEAL.] B. F. HICKMAN,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. William H. Kimball and Gustavus D. S. Trask, against James J. West. Duly certified copy of the transcript of the record & proceedings in the above-entitled cause.

(Indorsement on cover:) No. 510. William H. Kimball and Gustavus D. S. Trask, appellants, vs. James J. West. Missouri C. C. U. S. Filed 23d February, 1871.

Supreme Court of United States.

WILLIAM H. KIMBALL AND GUSTAVUS D. S. TRASK, *Appellants.*
vs.
JAMES J. WEST, *Appellee.*

ABSTRACT OF PLEADINGS.

The appellants, complainants in the Court below, on June 22, 1868, filed their bill against the appellee, defendant below, setting forth that, on the 31st day of January, 1865, the defendant sold and conveyed to one R. P. Elmore (who was merely their agent in the transaction), with general warranty, a tract of land in West Virginia containing about 388 acres, for $22,000; that Elmore subsequently conveyed the property to the appellants, in pursuance of his agency for a nominal consideration; that West had induced Elmore to purchase the tract by representing the title to it to be good, and that there was no incumbrance on the property, nor claim against it; that there was in fact a suit in ejectment then pending, which had been instituted in 1860 by one Lynch to recover 184 acres of the tract, and was terminated in 1866 by a judgment in favor of Lynch; that West had fraudulently concealed this claim of Lynch from the appellants and their agent, and subsequently abandoned the possession without notice to the appellants, though he had agreed to hold it until they were ready to receive it from him, and praying for a rescission

of the contract of sale and that West might be decreed to refund the purchase money.

West, in his answer, admits the sale to Elmore, but denies the charge of fraud, bad faith and misrepresentation, or that he made any representations at all on the subject; admits the pendency at the time of sale, of Lynch's suit in ejectment, and his subsequent recovery of 164 acres of the tract, but denies that the portion so recovered was the most valuable or the main inducement to the purchase; and avers that Lynch's success was due, not to the strength of this title, which was only a tax title, but to a conspiracy between Lynch and Elmore. He further avers that, at the time of sale, Elmore was fully cognizant of Lynch's claim and the nature of it; and that he (West), though he considered himself under no obligation so to do, did, in fact, in August, 1868, purchase from Lynch and procure to have a conveyance executed to himself of all Lynch's right and title in and to the property—which conveyance, he avers, doth inure to the benefit of Elmore and his grantees;—and he avers his readiness to secure all other conveyances which the Court might deem proper.

Testimony, both oral and documentary was taken, and the cause being ready for hearing, the Circuit Court, on the 19th of May, A. D. 1870, passed an interlocutory decree requiring West to execute a conveyance to Kimball and Trask, to be approved by a master in chancery. West did accordingly execute such a deed, which was approved by the master and reported to the Court, and the report was confirmed. The deed was then tendered to these appellants in open court, and they refused to accept it; whereupon the bill was dismissed. From the final decree dismissing the bill, the complainants appeal.

The documentary evidence introduced comprises the

deed from West to Elmore; that from Elmore to the complainants; a deed from Trask to Elmore of a portion of the tract; another from Elmore to one Baily and one from Baily to the complainant Kimball, of the same portion; and a title bond given by West to Elmore preliminary to the purchase; also, a section of the laws of Virginia, showing the scope of the expression "general warranty" used in the deed from West to Elmore; also a deed from William Lynch to West.

R. P. Elmore testified to the circumstances of the purchase and his agency, as set forth in the bill, states that he was authorized by Kimball and Trask to purchase the tract, if a good title could be had; conferred with one Phelps, attorney for West, and received from West and Phelps an abstract of the title, signed by Phelps and certified to be correct by one Fisher, the Recorder of the County. Both West and Phelps vouched for the correctness of the abstract and that the title was perfect in West. No mention was ever made to him of Lynch's claim. The abstract referred to, which is annexed to the deposition of Elmore, states that "there is no judgment liens, *les pendens*, trust deeds, or taxes delinquent on the above-described tract of land, the record is entirly clear, from my own examination."

The testimony of Elmore is corroborated by that of Fisher and one Lockhart, witnesses for the defense, by the complainant Kimball, Lyman Elmore, James M. Jackson, and J. B. Jackson, attorneys, and by William Lynch, the plaintiff in the ejectment suit mentioned in the bill. Their testimony developes the fact that, on the trial of the ejectment suit, West's attorney made no defense, but permitted the case to go by default; that about the time of the sale to Elmore, West was in treaty with Lynch to purchase the latter's claim and actually

agreed to purchase it out of the money to be paid by Elmore, but abandoned the State without fulfilling his agreement; that Lynch never had any understanding whatever about the suit with the complainants or with Elmore; that neither Elmore nor the complainants ever took possession of the land, and that, after the commencement of the suit about August 1, 1868, West procured from Lynch a deed of the latter's interest, but that the deed was only delivered in *escrow*, and was to remain in the hands of a third party until the consideration therefor was wholly paid, which had not been done up to January 2, 1869, the date of Lynch's deposition: yet the deed was recorded August 6, 1868. On a subsequent examination of Lynch, March 22, 1869, he testified that West had on that day paid him the balance of the aforesaid consideration.

For the defense, the testimony of Geo. W. Cline and Mary Cline, father-in-law and mother-in-law of West, tended to show that Lynch's claim was spoken of between West and Elmore, and was by the latter treated as of no account; and the depositions of George E. Ball, George Monroe, L. Haverty, and Z. M. Knight were taken to show the relative value of the portion recovered by Lynch as compared with the remainder. West's own testimony was also taken in support of his answer.

R. T. MERRICK,
Of Counsel for Appellants.

Supreme Court of United States.

KIMBALL, *et al.*, *Appellants*,
vs.
JAMES J. WEST, *Appellee*.
No. 287.

BRIEF OF APPELLANTS.

The appellants claim that, upon the failure of the vendor to make a good title to the whole tract, they were entitled to rescind the contract and to recover back the purchase money.

1. The appellants allege that the portion recovered in the ejectment suit was the most valuable part of the tract and was their main inducement to the purchase; and even admitting that it possessed no special advantage over the remainder, the amount of it being about five-twelfths of the whole, causes such a defect in the quantity contracted for that the purchasers ought not to be compelled to take the residue, and should be relieved from their purchase.

Sugden on Vendors, Vol. 1, Chap. VII, Sec. 2, p. 415, &c.
2 Story's Equity Jurisprudence, Sec. 778.
Reed v. Noe, 9 Yerger, 283.
Dalby v. Pullen, 1 Russ & Mylne, 296, 3 Simons, 29.
Bates v. Delavan, 5 Paige, 300.

Prendergast v. Eyre, 2 Hogan, 81.
Western v. Russell, 3 Ves. & Bea., 187.
Johnson v. Johnson, 3 Bos. & Pull., 162.
Wheatley v. Slade, 4 Simmons, 126.
Tomkins v. White, 3 Smith, 435.
Chambers v. Griffith, 1 Esp. Ca., 149.
King v. Hamilton, 4 Peters, 319.
Cooper v. Brown, 2 McLane, 495.

2. The deed from Lynch to West, of August 1, 1868, having been given only in escrow and fraudulently and improperly recorded, and the complainants having become acquainted with the circumstances of the execution, delivery and record of said deed, and of the non-payment of the purchase money by West, the said deed inured to their benefit only subject to all the equities between Lynch and West, and was insufficient to convey a good and valid title.

Walden v. Bodley, 9 Howard, 34.
Smith v. Shane, 1 McLane, 22.
Oliver v. Piatt, 3 Howard, 333.

3. The complainants having rescinded the contract, as they were entitled to do by the filing of their bill, an entire recission of the contract should have been decreed, or at least compensation for the portion included in the ejectment suit.

Bank of Columbia v. Hagner, 1 Peters, 455.
Kleine v. Catara, 2 Gallison, 61.
Cooper v. Brown, 2 McLane, 495.
Taylor v. Langworth, 14 Peters, 174.

R. T. MERRICK,
Of Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM H. KIMBALL and
GUSTAVUS D. S. TRASK,

Appellants,

vs.

JAMES J. WEST,

Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM H. KIMBALL and
GUSTAVUS D. S. TRASK,
Appellants.

vs.

JAMES J. WEST,
Respondent.

Appeal from the Circuit Court of the United States, for the Districts of Missouri, in equity.

This was a Bill in Equity brought in the Circuit Court by the appellants against the respondent, to set aside the conveyance and rescind the sale of a tract of land, for alleged fraud.

It appears from the record that the respondent, in January, 1865, sold, and by deed of general warranty, conveyed to one R. Palmer Elmore a tract of land in West Virginia containing 400 acres, more or less, for the consideration of twenty-two thousand dollars. Subsequently, and before the institution of the suit, the title thus conveyed to Elmore became, by means of numerous conveyances found in the record, vested in the complainants.

The bill charges that the purchase was made by R. P. Elmore, acting as agent of the complainants and for the complainants, and that West, the respondent, in selling and conveying the lands was guilty of bad faith and fraud, and practiced deceit and imposition upon the plaintiffs and their agent, said R. Palmer Elmore. The fraud charged consists, *first*, of false representations, by West, to the effect that his title was perfect and free from incumbrances, and *second*, of the fraudulent concealment by respondent of the fact that one Lynch claimed part of the tract, for which part a suit was then pending against West in the county in which the lands lay.

The answer explicitly denies all the fraud charged, as well as many other of the allegations of the bill. The answer admits the recovery by Lynch of part of the land sold to Elmore, but alleges that as soon as the defendant heard of the recovery he

proceeded to West Virginia and procured from Lynch a deed for the part recovered, and thereby made perfect the title to the whole tract; and the defendant in his answer offered to make a new conveyance if necessary to convey and assure the title to the part thus derived from Lynch.

The bill required the answer to be on oath, and it was accordingly so put in. Complainants filed replication.

At the April term, 1870, (printed record, p. 13,) the cause was brought to a hearing, when the Court decreed that the respondant make a good and sufficient deed to the complainants, to be approved by a master, for the conveyance of the Lynch title. At the next term the master reported that West had made a deed in compliance with interlocutory decree, (Record p. 14), and the master's report having been approved by the Court and the defendant having tendered to the complainants in court the deed reported by the master, and the complainants having refused the same, a final decree was made dismissing the bill. The decree is right, and is sustained by the law and the testimony in the case. In support of the decree of the Circuit Court, we make the following points:

I. Waiving for the present the question whether the evidence proves the alleged fraud, we submit that upon the case as made by the complainants' own testimony, the complainants did not, in making the purchase, rely upon the truth of the pretended representations of the defendant, and they were therefore not *misled* thereby. This being true, the complainants have no remedy in equity. Story, Eq., Jur., (6th ed.,) § 191. Hough vs. Richardson. 3. Story, R. 659, Small vs. Atwood. 1. Young, R. 407, S. C. 6, Clark & Fennell, 232.

The complaints show that they did not rely upon the truth of the pretended misrepresentations;—1st, by taking full covenants of warranty— not a warranty against persons claiming under the grantor, but against the claims of *all persons whomsoever;* and 2d, by an express reference of the question of title to their attorney, J. B. Jackson,—[see deposition of R. P. Elmore (on this point,) Record p. 28, and of Jackson at p. 41]. Their conduct disproves their pretensions. They charge that the defendant represented himself as having a clear title, and that they relied upon the truth of this representation; but when a conveyance was to be received did they content themselves with a deed which would merely invest them with the title? Not so; but on the contrary they require a deed which contem-

plates a failure of title, and in case of failure, secures to the vendee a return of the whole purchase money. In short, the complainants deal with the defendant at arms length, trusting him in nothing.

The cases that we have cited above establish the doctrine, that in order to justify the interference of a court of equity in cases of this sort, the clearest and most decisive proof must be given, as well that the fraudulent representations were made, *as that they were made under such circumstances, as show that the contract was based on them.* The proofs in this case fall exceedingly far short of this requirement.

II. There is an utter failure of proof in the case.

We are in a court of equity, where the answer of the defendant traversing the allegations of the bill is equivalent to two witnesses, or one witness and strong corroborating circumstances. This measure of proof has not been met in this case as we insist.

(*a.*) It will be borne in mind that all of the sworn testimony of the appellants was taken *exparte*, and for that reason is deprived of much of the weight it might otherwise possess.

(*b.*) A most noticeable fact in connection with the testimony of the three witnesses, Lyman Elmore, R. Palmer Elmore, and Wm. H. Kimball, one of the complainants, by whom the fraud is attempted to be proved, is that every one of them entirely ignores *the title bond made by West and wife.* There is not the slightest allusion to this paper in either the bill or the plaintiff's depositions. The first we hear of it from that quarter is its production on the trial; and a most important instrument of evidence it proves to be for the defendant. Why it was thus ignored we will not stop to enquire. It would never occur to one reading these depositions, that there had been anything like a contract for the sale and purchase of this land until the delivery of the deed, and after the pretended exhibition to the vendee of the notable Phelps abstract of title. R. P. Elmore says in his deposition [Record pp. 27 and 28.] "Just *before I purchased* I saw one R. E. Phelps. West's lawyer, *about the purchase*, and he told me he had examined the records, and that the title was all right in West, and *at the time of the purchase*, West came to me with a deed of said land and an abstract of title." * * * * "said abstract was signed by Phelps, and certified by C. B. Fisher, the Recorder."

Kimball, midway of his deposition [Record p. 35.] says, "*just*

before the purchase of said lands I met West and asked him if he could give a perfect title" &c., and again he says, "at the time I saw West he produced and showed to me an abstract or statement of the title." The time of the pretended exhibition of abstract, and that of the pretended interrogation by Kimball as to the title are one and the same occasion; he speaks of seeing West but once.

Lyman Elmore, the *lawyer* and witness, as occasion required, of this band of speculators, says in his deposition that in January, 1865—he thinks the 26th of the month—he was at West's house and had a talk with him about the title, when he, Lyman, told West that he, West, [Record p. 36,] "must get an abstract from the Records showing a perfect and clear title in him *before the plaintiffs would purchase.*" * * * * * "Afterwards, said West showed me, at Burning Springs, an abstract of title to said property, signed by R. E. Phelps, attorney, dated January 30th, 1865, and certified," &c. * * * * "I examined this abstract and supposing there was no deceit or fraud about it, I advised R. P. Elmore, plaintiffs' agent, that the title was good in West." * * * "and upon the strength of that abstract, R. P. Elmore acting as plaintiffs' agent did purchase said property."

Thus it is seen that all three of these witnesses deliberately swear that the purchase was made subsequent to and as a consequence of this so-called abstract dated the 30th of January; whereas the title bond dated 27th of January, shows that the purchase was made three days prior, and therefore without any regard to the abstract or its recitals.

Prima facie, the title bond was made at the time it bears date. No authority need be cited to sustain this proposition. In the case at the bar this *prima facie* presumption is made conclusive by the other evidence in the cause. Lyman himself says [Record p. 36], that he in company with the plaintiffs was at West's house in January, on the 26th, as he thinks, had a talk with West and left. He does not say that he ever returned there, or that he did not, but West in his deposition taken the 2d and 3d days of April 1869, a year before the trial, [see same beginning at p. 58 of printed record] swears that the next day after the visit of Lyman and his party, Lyman returned and the contract was closed then and there, by a writing signed by West and wife. This was the morning of the very day of the date of the title bond, supposing Lyman was right in fixing the

26th as the day of his first visit, and I am willing to accord to him the merit of having told this one truth, protesting, however, that I have no reason to believe he would have told even this one had he seen the bearing it might have in the case.

Now, when this fellow testified, as he did testify, that before the purchase this abstract of the 30th of January was exhibited by the defendant, and that the witness examined it, and upon the strength of it advised the purchase, and that on the strength of it the purchase was accordingly made, he affirmed what he must have known was false. He could not have helped remembering that he it was and not R. P. Elmore that made the purchase, and that the purchase was not made on the 30th of January after the preparation of an abstract of title, but before, on the 27th, in the country, at a time when West could not have had an abstract made. The whole story about Phelps' attorneyship to West, and about West's having had any abstract made is a miserable fabrication.

Another circumstance confirmatory of the presumption in favor of the date, is that the bond is signed by both West and wife, [Record 27,] and is not witnessed or acknowledged before any officer. It is in just such condition as an instrument of that sort would probably be found in, executed by the vendors at their home in the wilderness. If the bond was made at the time it bears date, it forever disposes of the question of the pretended fraudulent representations.

It was a clear contract of sale, requiring the performance of no act or condition whatever by West, the vendor, except the making of *a deed of general warranty* when the purchase money should be paid. No stipulations for *abstract of title* given or required —the sale was unconditional and complete, and from and after that contract, West held the title in trust for Elmore, the vendee, and Elmore the purchase money for West, the vendor. No representations as to title or promises of abstracts after that event (if any were made, as we deny,) were of any consequence.

(*c.*) The answer of West explicitly denies all of the allegations of the bill on which the complainants rest their claim to equitable relief. The allegations are (substantially) that at or before the sale the defendant made certain false and fraudulent representations, and resorted to certain fraudulent practices to deceive and defraud the complainants.

It is ascertained by the most indubitable evidence that the sale was made on the 27th of January. *All* of the testimony of

R. P. Elmore, and the plaintiff Kimball, in regard to the pretended representations and practices point to periods of time subsequent to that day, as has been shown, and their testimony dees not therefore bear upon the issue, and must be thrown out of the consideration of the court. The only remaining witness testifying on the subject of representations is Lyman the lawyer, and all that he testifies to as having occurred before the sale is comprised in two lines, in these words: "he (West) said the title was perfect in him, that there were no claims or liens of any name or nature upon it." There is then but one witness without a single corroborating circumstance to put in the scale against the answer of the defendant, and the complainants' case must therefore fail for want of proof.

But if the field of enquiry was extended so as embrace the whole period of time anterior to the delivery of the deed to R. P. Elmore, I would still insist that upon the evidence in the case the finding should be for the defendant, as it was.

The complainants' witnesses are unworthy of credit.

Lyman Elmore is unworthy of belief; *first*, because he deposes to facts as true, when it is evident he cannot and does not know the truth of the facts deposed to; for example, he says "upon the strength of that abstract R. P. Elmore did purchase said property" * * * * and that the "consideration so paid was the money of the plaintiffs" * * * * "I do not think that the plaintiffs knew of the existence of the Lynch suit till long after judgment," * * * * "and I *know* R. Palmer Elmore, their agent, did not know of it." * * * * "I know that the deed (from R. P. Elmore to the plaintiffs) was given merely in furtherance of said Elmore's agency, and that the consideration named, ten thousand dollars, was merely nominal."

Second, because he deposes to facts material to the case, the falsity of which is shown by the plaintiffs' evidence, and which he must have known when he testified; for example, he says at the close of his deposition, "The purchase was made *entirely upon this abstract*" Now when he made this statement he could but know that it was false. He knew that that abstract had no existence prior to the 30th of January, and he just as well knew that the purchase was made the 27th of January, three days before.

Third, he shows himself a swift witness; he is a witness of the most enormous resources; there was not a fact which it was

necessary for the plaintiff to establish in order to a recovery, that he did not perfectly know, and swear to; nor was there scarcely a fact which could go to make out the defendant's defence that he did not disprove.

Fourth, full as Mr. Lyman is of resources, he is an *inharmonious* witness. From the day of his visit to West in his mountain home till the deed is sealed and delivered and the 22,000 dollars consideration paid he gives his virtuous soul no rest, lest his clients may be led to pay their money and yet get no title. "*Title*," "*title*," "*title*"! is the vision that haunts his every dream, wherever he goes, to whomsoever he speaks, in season and out of season, the ever recurring question of *title* is foremost and uppermost. But the deed is made, his clients' money is paid, when, "*Presto change*"! "some time afterwards I, (the attorney who but lately was so zealous for the interest of my client,) learned by hearsay, (of course by hearsay,) that the title to the property was imperfect, but not the nature of the imperfection." Now in this emergency what would be expected of one who before the investment of his clients' money had shown such astonishing solicitude about his clients' title? Why, that he would at once inform his client and his clients' agent of this hurtful rumor, and himself, (being *a lawyer*,) take the necessary steps to acertain the truth of the report, but nothing of the kind! But soon thereafter he meets Mr. West and calls his attention to the rumor. West frankly confessed that he had cheated him, had "come it over him," had got their money and they might help themselves—defied them. Still he gives no information to his clients nor to their agent that they might take steps to protect themselves against this enormous swindle nor does he inform himself, or even enquire of West wherein the cheat consisted, but closes this branch of his testimony by saying, "*I did not know at that time the nature of the incumbrance and never did know until after Lynch obtained judgment*, not till the year 1867." Either the story of the oft repeated declarations of West about title, or the one about this post-purchase interview with West is false, it is no matter to us which. The probability is both are false. But whether one or both, the witness is stamped as unworthy of belief.

Now for *R. P. Elmore* and *Wm. H. Kimball* as witnesses:—they are more covert, less brazen-faced than Lyman, but no less false and untrustworthy:

First, nothing is more apparent than that this purchase was

made purely for *oil purposes* and *oil speculation*, and yet these witnesses both, upon the point of what was the main inducement to purchase, studiously keep the oil aspects of the purchase out of sight, and deliberately attempt to make the impression that the purchase was made for purposes of *agriculture* and *habitation*.

"The most valuable part of the tract," says Kimball, "is that recovered by Wm. Lynch. It is the best timbered—it is the best land—*the most tillable*—has the house and orchard upon it—lies the best in all respects, for all purposes. It was more for this part of the tract that we concluded to purchase; without this the remainder would be valueless and unsaleable." [The utter deceitfulness and falsity of these statements appear further by the testimony of a number of witnesses, whose depositions are in the record, shewing that this *house* spoken of was a miserable, old *one-room log-cabin in a state of decay and dilapidation*; that the orchard consisted of twenty-five or thirty apple trees, a part only of which was embraced within the Lynch recovery, and that in point of fact for all agricultural purposes, as well as for oil indications, the part recovered was less desirable than the remainder of the tract.]

Second, they both conceal the fact, which must have been known to them, that the contract of sale was consummated on the 27th day of January, and deliberately affirm, over and over again, that the contract originated at a subsequent time, and was induced by facts which subsequently transpired.

Third, in their undue anxiety to make out their case, they make improbable statements, and contradict themselves and each other:—

Kimball says "At the time I saw West he produced and showed me an abstract or statement of the title". * * * "This abstract was shown to me by West as true and correct, and *I* relied upon it as such in any and all instructions I subsequently gave our agent, R. P. Elmore, as to purchasing said land". [This is exhibition No. 1, of the abstract, and as it had the effect of satisfying Mr. Kimball, who was the real party concerned, of the goodness and clearness of West's title, as Mr. Kimball swears it did, one would think, naturally this would be an end of the enquiry, but,] R. P. Elmore swears, "at the time of the purchase, West came to me with a deed and an abstract of the title to the land."

"In the purchase *I* relied *entirely* upon the abstract, [not upon the orders of Mr. Kimball, my principal,] backed by the

assurance of both West and Phelps that it was correct and in accordance with the facts, and that there were no incumbrances of any description on the land". This is exhibition No. 2 of the abstract, and again it produces its desired effect. This exhibition, says the witness, was at the time of the purchase, which was a time prior to the delivery of the deed, for the evidence shows that a partial payment had been made some days before the delivery of the deed, when, according to the witness, Jackson, the balance of the purchase money was paid. We would now suppose we would never again hear of this ubiquitous abstract, but not so; a meeting takes place to close out the transaction, when, to the astonishment of everybody, up turns the abstract, West and his lawyer, with a repetition of assurances by West that all is right! This was exhibition No. 3. "My attorney, J. B. Jackson of Parkersburg, W. Va., also advised me, that, according to said abstract the title was perfect, and West so told Jackson in my presence." Strange, improbable, that West should volunteer his testimony in corroboration of an abstract that had hitherto, unaided, worked so well in producing the desired conviction; but of course he did volunteer. Stranger still that Mr. Jackson should have given the pretended advice: for the thing called an abstract, was no abstract at all, and could not in the slightest degree aid a lawyer in making an opinion as to the title;—indeed, Mr. Jackson himself gives the lie to the statement. He says, "If [the abstract was] shown to me, I gave no opinion as to it, as I was not acquainted with the title". But most strange of all, that after having made the contract, relying *entirely*, as he says, on this abstract, he should still resort to Jackson, his attorney, for advice.

Thus, according to these gentry, Kimball relied on the abstract, and ordered R. P. Elmore to purchase; R. P. Elmore, forgetful of the decision of his principal, himself made the purchase, relying *entirely* on the abstract; but still took advice of his counsel Jackson, not exactly relying on the abstract; and Lyman relying upon the abstract, *advised* R. P. Elmore to buy, and R. P. Elmore accordingly did buy. I don't think West exhibited this abstract quite so often as these gentlemen suppose. It was against reason that he should do so. In their eagerness to make out fraud, these witnesses have quite overdone the thing.

Mr. Kimball exposes himself to still further criticism by omission to say that he was present, and by failing to detail what occurred on the occasion of the visit at West's house

when negotiations were opened. He was certainly there on that occasion, if Lyman is to be credited. Lyman swears that both Kimball and Trask were present. What transpired then and there was of the utmost moment. Lyman and West have both given their account of it, differing widely; Lyman makes West declare that his title was perfect, no claims or incumbrances; whereas West informs Lyman and his party distinctly of the fact that there was a claim against him and that its existence was a reason why he preferred not to sell, but that Lyman was ready and anxious to buy, this claim to the contrary notwithstanding. According to Lyman he made it a condition to the purchase by the plaintiffs, that West should first get an abstract of the title from the Recorder. *According to the documentary evidence, the plaintiffs, or rather R. P. Elmore, did purchase without the required abstract.*

Now, if the facts attending that interview were as Mr. Lyman supposes, and not as Mr. West has sworn, how beautifully would the testimony of Mr. Kimball have come to the support of Mr. Lyman. It was very important. But he does not come, and the question "why?" is exceedingly pertinent. An equally pertinent question is why was not the plaintiff, Trask examined in the case? He is shown to have been present on this important occasion. It will not do for Mr. Kimball to dispose of Trask by saying as he does that Capt. Trask knows little or nothing about the land. If he was present at that first interview he does know much that is most material, and it may be that it is just for that reason that we are not favored with his evidence. Possibly he has a conscience that would restrain him from false swearing.

Again the attempt of these men to show, by way of excusing their *laches* in bringing suit, that West agreed to keep possession for the plaintiff, and in violation of it left secretly, and his whereabouts unknown, is so improbable, is so manifestly a mere subterfuge, as to further cast discredit upon all they say; especially in face of the proof, by a number of witnesses, that his departure from the country was public and well known to all his neighbors.

III. The answer of the defendant is sustained by the evidence in the case.

Against the testimony of these three witnesses, is (1st) that of the defendant West, which I commend to the court for its perfect fairness and straight-forwardness, and for its consistency

with itself, and with the other reliable testimony in the case; (2d) that of Mrs. Cline who was present and heard conversation between West and Lyman, on occasion of opening negotiations, confirming substantially the testimony of West; (3d) the deposition of G. W. Cline, to admissions made by Lyman—and (4th), the depositions of Fisher and Lockhart, the clerks, as showing that about the time of this transaction, persons, *strangers* to the office, examined the papers in the case of Lynch vs West. West was not connected with this examination, for he was not a stranger. The evidence is competent as tending to show that the persons were the plaintiffs, or those in their interest—they were strangers in the country *and the only persons shown to have been in anywise concerned in that matter.*

An attempt has been made to depreciate the character of West by means of the testimony of the witness Lynch. The impeaching testimony is clearly illegitimate, but I beg leave, nevertheless, to make a word of explanation—Lynch testifies that after the sale to Elmore, West agreed to give him sixteen hundred dollars for his title, but left the country without complying with his agreement—this is shown, as well to prove that West is a scaly fellow, generally, as to confirm the notion that he meant to defraud the plaintiffs. Now, when it is remembered that Lynch's claim was based upon a *tax title* only, and that West had been advised by his attorney in the case that the case was defensible, and had also been urged by this fellow, Lyman Elmore, not to compromise, it is not strange that he should change his mind and decline the compromise, taking upon himself the risk of responding in damages to the plaintiffs, on his covenant of warranty. He did just what every man not unusually cautious would have done in like circumstances.

IV. Equity will not interpose to rescind the contract, but will leave the parties to their remedy at law, unless the part of the tract to which the title failed was the main inducement to the purchase, or was necessary to the enjoyment of the remainder, upon the principle that equity lends its aid only where the law cannot afford an adequate remedy.

2 Kent Com. 475-6.

The burden of showing this fact as the ground of their right to equitable relief rests upon the plaintiffs. Upon the whole evidence it is manifest that the Lynch part of the tract did not constitute the main inducement to the purchase and is not necessary to the enjoyment of the rest of the tract, and therefore the

plaintiffs' equity fails, and they must be remitted to their action on the covenants in the deed.

V. Complainants have never been disturbed by this adversary title, nor is it shown they have been in any wise injured thereby. True Lynch in his *exparte* deposition for complainants testifies that he took possession after he recovered in ejectment, but he clearly shows this was not true in fact in his deposition taken by the defendant on notice and subject to cross examination.—(See record, page 42).

So the deposition of Geo. E. Ball, (Record, page 53.) proves the land in possession of tenants of the complainants, the *Knights*, at the time of the institution of this suit. The same fact is shown by the deposition of Z. M. Knight, (Record 67.).

VI. The defendant being able at the hearing to give the complainants a good title, and offering to do so, it was the duty of the court to refuse, as it did, to rescind the sale.

Edwards vs. Leary *et al.*, Cooper's Cases in equity, 308.

Pierce vs. Nichols, 1 Paige, Ch. R. 245.

Seymour vs. DeLancy *et al.*, 3, Cowan, R. 445.

Fletcher vs. Wilson, 1, Smedes and Marshal, R. 376.

Frost vs. Benson, 6, Yerger, R. 36, (by Catron, Judge.)

It is therefore submitted that the decree of the Circuit Court must be affirmed.

DRYDEN & DRYDEN,
For Respondent.

J. W. & W. Dryden
for Resp'ts.